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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1141.

FREDERICK HOPT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 20, 1884.

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1 TERRITORY OF UTAH,
In the Third Judicial District Court:

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FRED. WELCOME AND JACK EMERSON. } Murder in the first degree.

Fred. Welcome and Jack Emerson are accused by the grand jury of this court by this indictment of the crime of murder in the first degree, committed as follows: The said Fred. Welcome and Jack Emerson, on the 3d day of July, 1880, at the county of Summit, in said Territory, with force and arms and with some deadly instruments and weapons, to the grand jury unknown, feloniously, wilfully, deliberately, of their malice aforethought and premeditatedly did make an assault in and upon one John F. Turner, and with said deadly instruments and weapons did then and there feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, mortally wound said John F. Turner in and upon the side of his head and face, of which said wound the said John F. Turner did then and there die, and the grand jury aforesaid do say
2 and charge that the said Fred. Welcome and Jack Emerson, in the manner and form aforesaid, feloniously, willfully, deliberately, maliciously, premeditatedly, and of their malice aforethought did kill and murder, contrary to the form of the statutes of said Territory, in such case made and provided and against the peace and dignity of the people aforesaid.

JOHN CUNNINGTON,
Foreman of the Grand Jury.

JAS. H. BEATTY,
Ass't U. S. Att'y.

(Endorsements:) 4635. Title of court and cause, murder. A true bill. John Cunnington, foreman. Witnesses, Charles E. Bates, Thomas J. Stilfox, Thomas Fowler, John W. Turner, David Moore, J. F. Benedict, E. M. Allison, A. J. Moore. Presented in open court by the foreman of the grand jury in its presence & by me filed this 14th day of December, 1880. O. J. Averill, clerk, by H. G. McMillan, deputy clerk. Dec. 14, 1880, issued warrant. Dec. 17, 1880, def'ts arraigned, and say they do not desire the court to appoint counsel. Def't Fred. Welcome says his true name is Frederick Hopt, and def't Emerson says his
3 true name is John McConnell, and each pleads not guilty.

Feb'y 16th, 1881, jury empaneled to try def't Hopt.

Feb'y 19th, 1881, filed and entered verdict of guilty as to def't Hopt.

March 18th, 1881. Motion of def't Hopt. for a new trial overruled.

April 4th. Def't Hopt sentenced to be shot; new trial allowed by supreme court.

March 2–7, 1883. Jury trial of def't Hopt.

March 9th, 1883. Filed verdict of guilty.

March 22d, 1883. Filed motion for new trial.

April 2d, 1883. Motion for new trial overruled, and def't Hopt sentenced to be hanged.

June 1, '83. New trial allowed by supreme court.

1884, April 28th. Empaneling of jury of 3d trial.
1884, April 29th. Jury empaneled and sworn and trial in progress from day to day, to and including May 5th.
1884, May 5th. Filed and entered verdict of guilty of murder in the first degree.
1884, May 8th. Filed notice for new trial.
1884, May 9th. Motion for new trial overruled.
" " " Def't sentenced to be shot June 13, '84.
" " 10. Filed notice of appeal.

4 THE PEOPLE OF THE TERRITORY OF Utah *vs.* FRED. WELCOME AND JACK EMERSON. } Indictment for murder in the first degree.

On this day the defendants are arraigned at the bar in open court in due form of law. Def't Fred Welcome says his true name is Frederick Hopt; def't Jack Emerson says his true name is John McConnell, and they each say they do not desire the court to appoint counsel at the present time, and each defendant demands a separate trial, and each defendant pleads to said indictment "Not guilty," and the prisoners are remanded to the custody of the U. S. marshal, Dec. 17th, 1880.

MONDAY, *April 28th, A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred Welcome and impleaded with another. } Murder 1st degree.

On this day the case comes on for trial of defendant Hopt, and said defendant, by his attorneys, moves for a continuance of said case
5 upon the affidavit filed, and the same is argued by S. H. Snider and Wm. G. Van Horne for defendant, and by W. H. Dickson, U. S. district att'y, and Arthur Brown for the prosecution, and the court now fully advised, and it appearing to the court that the affidavit is insufficient and is in bad faith and that the motion ought to be refused, it is ordered that said motion for a continuance be and the same is hereby refused. To which defendant duly excepted.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, and impleaded with another. } Murder in the first degree.

On this day this cause coming on for trial, the defendant in person is present with S. H. Snider and A. Miner, his counsel heretofore appointed by the court; and at the request of the defendant A. Miner, esq., is excused from acting as counsel for defendant and W. G. Van Horne is associated as counsel for defence by his appearance as such. W. H. Dickson, U. S. dist. att'y, and Arthur Brown, counsel for the prosecution,
6 are present; and the empaneling of a jury to try the case against the defendant, F. Hopt, is proceeded with, each juror first being

passed by both parties upon statutory qualifications and afterwards sworn upon his voir dire, to wit:

Byron Roberts: Passed for cause.

Orrin S. Lee: Challenged by defendant for implied bias; denied by prosecution; overruled; exception; challenged by def't for actual bias; overruled; exception; challenged by def't peremptorily. Juror excused.

Silas T. Lake: Challenged by def't for implied bias; denied by pros.; overruled; exception.

S. H. Clawson: Challenged by def't for implied bias; allowed. Juror excused.

John Acomb, jr.; Challenged by defendant for implied bias; not denied; allowed. Juror excused.

John Beers: Challenged by def't for implied bias; not denied. Allowed and juror excused.

Henry F. Benton: Challenged by def't for implied bias; allowed. Juror excused.

Ephraim Hatch: Challenged by def't for implied bias; denied; overruled; exception; challenged by def't peremptorily. Juror excused.

7 John Gormly: Challenged by pros. for not believing in or willing to render verdict in case where punishment is death; excused.

A. J. Pendleton: Challenged by def'ts for implied bias; denied by pros.; overruled; def't excepts.

W. B. Hickman: Challenged by def't for having formed unqualified opinion; not denied; allowed, and juror excused.

Gideon Ryman: Excused because of having conscientious scruples about finding a verdict in a case in which punishment is death.

William Gedge: Challenged by def't for implied bias; denied; overruled; exception; challenged by def't peremptorily. Juror excused.

Isaac Hazelgrove: Challenged for having a fixed and unqualified opinton. Excused.

George A. Alder: Challenged for having a fixed and unqualified opinion; not denied. Excused.

John Gillespie: Challenged by def't for implied bias; denied; overruled; exception; challenged for refusing to answer defendant's question as to whether he were living in polygamy; refused; exception.

8 George Pack: Challenged by def't for implied bias; denied; overruled; challenged for actual bias; overruled; exception; challenged by def't peremptorily. Juror excused.

A. B. Mulball: Challenged for having an unqualified opinion as to guilt or innocence, if accused; not denied. Excused.

Alfred Thompson, John Higson, Robert Young: Each having an unqualified opinion as to the guilt or innocence of accused. Each excused.

George W. Richmond: Accepted and passed for cause.

George M. Turpin: Challenged by def't for implied bias; denied; overruled; exception; challenged by def't peremptorily. Excused.

Orrin E. Bates: Challenged for bias; overruled; exception.

Otto Solomon: Excused for having an unqualified opinion in the case.

D. C. Booth: Challenged by def't for implied bias; denied; overruled; exception; challenged for actual bias; overruled; exception; challenged by def't peremptorily. Excused.

Carl C. Asmussen, J. F. Corker: Each excused for having formed

9 an unqualified opinion, &c. At the request of the def't; the jury box is filled by calling another juror after each peremptory challenge.

Paul A. Elkin: challenged by def't for implied bias; denied; overruled; exception. Excused on peremptory challenge of def't.

Hugh McCorkindale: Absent; attachment issued; return, that is out of the Territory.

Charles Gilmore: Passed for cause.

David A. Anderson: Challenged by def't; implied bias; overruled; by def't for actual bias. Excused by the court.

M. K. Harkness: Excused for having formed an unqualified opinion.

Joseph H. Proctor: Challenged by def't for bias; not denied. Juror excused.

J. J. Farrell: Excused for having formed an unqualified opinion in case.

Joseph C. Hamilton: Challenged by def't because he refuses to answer whether he is a polygamist or not. Challenges for both implied and actual bias are overruled; def't excepts. Excused by def't peremptorily.

Thomas Cupit: Having formed an unqualified opinion in the case is excused.

Henry E. Fyson: Not a citizen of the U. S. Excused.

Orson S. Clawson: Having formed an unqualified opinion in the case. Challenged and excused.

10 Robert Maunder: Having formed an unqualified opinion. Excused.

George Raybould: Challenged by def't for implied bias; denied; overruled. Passed.

And the jurors are warned by the court, and the further hearing in the case is continued until to-morrow at 10 a. m.

Ordered that court be adjourned till to-morrow at ten o'clock a. m.

TUESDAY, *April 29th*, *A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT INDICTED IN THE NAME OF Fred. Welcome and impleaded with another. } Murder in the first degree.

On this day the defendant, Frederick Hopt, with his counsel are present, also the counsel for the prosecution, and the jurors, and the empanelling of a jury to try the case of said defendant is resumed.

Byron Roberts: Excused by def't peremptorily.

M. S. Pendergast: Having formed an unqualified opinion; not denied. Is excused.

C. H. Haight, true name W. H. Haight: Excused.

George W. Earl: Challenged by def't for implied bias; denied;
11 overruled; exception; challenged by def't for actual bias; allowed. Excused.

Benjamin Harker: Absent; attachment issued; returned juror sick in bed. Excused.

David Archibald: Challenged by def't for both implied and actual bias. Both challenges denied by pros., and both overruled. Exception.

Thomas Sappington: Challenged by def't, for both implied and actual bias; both denied, and both overruled. Exception.

Fred. Simon: Passed for cause.

E. W. Loder: Challenged by def't, for implied bias; not denied. Excused.

J. F. Woodman: Having formed an unqualified opinion in the case, excused.

Silas Pack: Challenged by def't, for actual bias; denied by pros.; allowed by the court. Excused.

David C. Dunbar: Challenged by def't, for implied bias, and allowed. Excused.

L. S. Heath: Not a tax-payer. Excused.

Joseph J. Daynes: Challenged by def't for implied bias; sustained. Excused.

M. W. Davis: Challenged by def't, for both implied and actual bias; both denied and overruled; def't excepts.

Edward Borcer: Challenged by def't, for bias; not denied. Excused.

12 Wm. C. Neal: Challenged by defendant for implied bias; not denied. Excused.

John Willoughby: Challenged by def't, for both implied and actual bias; denied by pros.; both challenges overruled; def't excepts.

Joseph A. Wagstaff: Challenged by def't, for both implied and actual bias; both challenges denied by pros., and both overruled; exceptions; challenged by def't premptorily. Excused.

James Barton: Passed for cause. Excused by def't peremptorily.

Ormus E. Bates: Excused by def't peremptorily.

Wm. C. Winder: Challenged by def't for actual bias; denied by pros.; overruled; exceptions. Excused by def't peremptorily.

Joshua B. Bean: Challenged by def't for implied bias; sustained. Excused.

G. M. Forbes: Passed for cause.

Silas T. Lake: Excused by def't peremptorily.

Alexander Pringle: Challenged by def't; bias denied; challenged peremptorily by def't. Excused.

Maroni Gillespie: Passed for cause.

13 And the following named persons, twelve, are now duly empanelled and sworn to try the case of the people, &c., vs. Frederick Hopt, &c.: A. J. Pendleton, John Gillespie, George W. Richmond, Charles Gilmore, George Raybould, David Archibald, Thomas Sappington, Fred. Simon, M. W. Davis, John Willoughby, G. M. Forbes, Maroni Gillespie.

The indictment is read and plea of defendant Hopt of "not guilty" stated to the jury by the clerk.

WEDNESDAY, *April 30th, A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, IMPLEADED WITH ANOTHER, &c. } Murder in the first degree.

On this day the trial before the jury of defendant Hopt is resumed. The jury is called, and all are present. The defendant, Hopt, with his counsel, and W. H. Dickson, U. S. att'y.

The defendant demands that all witnesses, while not actually testifying, be excluded from the court room. The prosecution asks one exception to the rule, and that is, that John Turner, the witness for the prose-
14 cution be allowed to remain, and the court allows the exception in case of the witness Turner, and excludes other witnesses. Defendant excepts, and during the absence of said witness Turner the court allows the witness Thomas Fowler to remain in court room at request of prosecution.

John Turner, Silas Alred, Len Phillips, Thomas Fowler, Charles E. Bates, John Wastergren, Cyrus B. Hawley, and George Akoff, are sworn, and testify for the prosecution, and the further hearing is adjourned till to-morrow at 10 a. m.

Ordered that court be adjourned until to-morrow at 10 o'clock a. m.

THURSDAY, *May 1st, A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, and impleaded with another. } Murder in the 1st degree.

On this day the defendant, F. Hopt, on trial, with his counsel, are present, also the jurors empanelled, and counsel for prosecution, and the trial herein is resumed. Alma Winn sworn to report the case. A. J.
15 Moore, Wm. Sutton, Alma Clyde, David Moore, Dr. J. M. Benedict, W. H. Morse, John W. Turner, Wm. Giles, Wm. Brown, George W. Campbell, F. C. Thomason, T. Jeff. Carr (def't calls T. J. Carr as his witness), and Alfred Simon, are sworn, and testify for prosecution. John Turner recalled, and further testified, and the hearing is adjourned until to-morrow at 10 a. m.

Ordered that court be adjourned until to-morrow at ten a. m.

FRIDAY, *May 2d, A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH, *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, and impleaded with another. } Murder in the first degree.

On this day the defendant, Frederick Hopt, on trial, with his counsel, the jurors empanelled to try the case and prosecution by W. H. Dickson, U. S. Attorney, and Mr. Thurman, associate counsel, are present, and the trial is resumed. Alfred Simon on stand for prosecution. The prosecution offer to read in evidence the testimony of J. C. Baird and
16 Wm. Reynolds given and taken at former trial of this case. Objected to by deft. Withdrawn and disallowed. Henry Evans, Richard Wickel, E. M. Allison, Milt. Thomas, and Jack Emerson, alias John McCormick, sworn and testified for prosecution. Deft. objected to the last witness testifying; overruled, and the prosecution rested.

John Clyde, Pat. Brennan, Fred. Simon, recalled; Mayer Sickel, John R. Falk, E. M. Allison, Wm. Sutton, John Arrowsmith and Isaac

Fisher sworn for defendants, and the hearing is adjourned until to-morrow at 10 a. m.

Ordered that court be adjourned until to-morrow at 9:30 o'clock a. m.

SATURDAY, *May 3d, A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH, *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, imp. with another. } Murder in 1st degree.

On this day, the cause coming on further for trial, and the def't., Hopt, with his counsel, and the jurors empanelled to try the case and counsel for prosecution are present, and the trial is resumed.

Charles Hoffman, Emanuel Baucaming, Thos. Murray, Henry
17 Walker, Hattie Rackman, Fred. Hopt, sworn and testify for def't.

By consent Alma Winn, the reporter, sworn and read the testimony of Chas. Jones, taken at former trial of the case, and the evidence and hearing adjourned until Monday at 10 a. m.

Ordered that court be adjourned till Monday, May 5th, 10 a. m.

MONDAY, *May 5th, A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, and impleaded with another. } Indicted for murder in the first degree.

On this day the jurors empanelled to try the case, Def't Hopt, with his counsel and counsel for prosecution are present, and the trial is resumed. Case finally argued to the jury by Mr. Thurman, for the prosecution, S. H. Snider and W. G. Van Horne, for the def't, and closed by W. H. Dickson for the prosecution, and the court charged the jury. Defendent's counsel except generally to the instructions given by the court on its own motion, and exception allowed, and the jury retired to the jury-
18 room in charge of sworn Bailiffs Miller and McCurdy, and subsequently, after considering of their verdict, the jury returned into open court, and through the foreman announced the verdict in the presence of all the jurors, and the verdict is recorded as follows, and read by the clerk to the jurors, to wit:

In the district court for the third judicial district of Utah Territory, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome and impleaded with another. } Indictment for murder in the first degree.

We, the jurors, empanelled in the above case, find the defendant, Frederick Hopt, indicted herein in the name of Fred. Welcome and impleaded with another, guilty of the crime of murder in the first degree, as charged in the indictment.

JOHN GILLISPIE,
Foreman.

MAY 5TH, 1884.

All the jurors all say the above is his verdict, and the court fixes Friday May 9th, 1884, for passing its sentence herein, and remands
19 the defendant to the custody of the U. S. marshal.
Ordered that court be adjourned until to-morrow at 10 a. m.

In the district court for the third judicial district of Utah Territory, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, and impleaded with another.
} Indictment for murder in the first degree.

We, the jurors, empanelled in the above case, find the defendant, Frederick Hopt, indicted in the name of Fred. Welcome, and impleaded with another, guilty of the crime of murder in the first degree, as charged in the indictment.

JOHN GILLESPIE,
Foreman.

MAY 5TH, 1884.

(Endorsed:) Title of court and cause. Verdict. Filed May 5th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

In the district court of the third judicial district of Utah Territory.

THE PEOPLE, &C.,
vs.
FLEDERICK HOPT.
} Stipulation.

20 It is agreed by and between the counsel for the people and defendant that the counsel for the people waive the requirement of law, as to giving written notice on the motion for a new trial in the above-entitled cause.

W. H. DICKSON,
U. S. Att'y for Utah.

MAY 8TH, 1884.

Filed May 8th, 1884.

O. J. AVERILL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

FRIDAY, *May 9th*, 1884.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, and impleaded with another.
} Murder in the 1st degree.

On this day the def't, Frederick Hopt, with his counsel, S. H. Snider, are present in open court, and said def't moves the court for a new trial

herein, upon the notice heretofore given, and said motion being argued by S. H. Snider, for defendant, and W. H. Dickson, U. S. attorney, and the court having now fully considered said motion, and the grounds and alleged errors, and it appearing to the court; and the court gives as its
21 reasons that there is no error which would justify the court in allowing a new trial, and that the verdict of the jury is sustained by the law and the evidence of the case, as given at the trial thereof, and it is ordered and adjudged by the court that said motion for a new trial be, and the same is hereby, denied and overruled. To which ruling and order defendant duly excepted.

Sentence of the Court.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, and impleaded with another. } Murder in the first degree.

Frederick Hopt, alias Fred. Welcome, stand up. Have you anything to say why the sentence of the court shall not be pronounced against you?

All that I have to say is that I am innocent.

You were indicted by the grand jury of this district of the crime of murder in the first degree, and have been tried by a jury in the manner provided by law, and have been found guilty of that crime. The
22 penalty affixed by the statute for the crime of which you have been convicted is death, and must be inflicted by hanging you by the neck until you are dead, or by shooting you, at your discretion. Which mode of death do you elect shall be inflicted upon you?

I choose to be shot.

It is the judgement of the court that you, Frederick Hopt, indicted in the name of Fred. Welcome, be taken from hence to some place of confinement until Friday, the 13th day of June next, and between the hours of ten o'clock in the forenoon and two o'clock in the afternoon of the last named day, in the yard of the jail or place where you are confined, or in some other private place in this Territory, you be shot until you are dead.

FRIDAY, *May 16th, A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, and impleaded with another. } Murder.

The time allowed by law for filing the bill of exceptions herein
23 having passed, the court, upon application of defendant's counsel, refuses to further extend the time. Defendant excepts.

24 *Notice of appeal.*

In the district court of the third judicial district of Utah Territory, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDI'TED FOR MURDER IN the name of Fred. Welcome.

To the clerk of said district court, and to Dickson, U. S. dist. attorney for Utah Territory:

Please take notice that the defendant in the above-entitled cause hereby appeals to the supreme court of Utah Territory from an order made and entered in said cause in said district court on the 9th day of May, 1884, denying defendant's motion for a new trial therein, and also from the judgment therein made and entered in said court on the 5th day of May, 1884, against said defendant in said cause, and from the whole of said judgment this May 10th, 1884.

S. H. SNIDER AND
W. G. VAN HORNE.

(Endorsed:) Title of court and cause. Notice of appeal. Filed May 10th, 1884. O. J. A'erill, clerk, by H. G. McMillan, deputy clerk.
Without waiving any objection to the time of notice of service thereof, service of copy accepted this 10th day of May, 1884.

W. H. DICKSON,
U. S. Dist. Att'y.

25 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, O. J. Averill, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original indictment with endorsements, arraignment, and plea, &c. Journal entries April 28th, 29th, 30th, May 1st to 5th inclusive, verdict, stipulation, order overruling motion for new trial, sentence of the court, order refusing to extend time for filing bill of exceptions, motion to amend record, order overruling motion to amend record, orders on motion to amend record, overruling, &c., motion for stay of execution, order denying stay of execution, and notice of appeal to supreme court, in the above, entitled action filed in my office.

Witness my hand and the seal of the said court at Salt Lake City, this 3d day of June, A. D. 1884.

[SEAL.]

O. J. AVERILL,
Clerk,
By H. G. McMILLAN,
Deputy Clerk.

(Indorsed:) Supreme court. People, &c., vs. Fred Hopt, imp., &c. Transcript. Filed June 4, 1884. E. T. Sprague, clerk.

26 Supreme court, Utah Territory.

THURSDAY, *June 5th, A. D.* 1884.

* * * * * * *

THE PEOPLE OF THE TERRITORY OF UTAH, respondents, *vs.* FREDERICK HOPT, IMP., &C., APPELLANT. } From 3d dist.

This cause coming on regularly for hearing on the appeal from the judgement therein, was argued by W. G. Van Horne for appellant, W. H. Dickson for respondents, submitted, and taken under advisement.

27 Supreme court, Utah Territory.

FRIDAY, *June 6th, A. D.* 1884.

* * * * * * *

THE PEOPLE OF THE TERRITORY OF UTAH, respondents, *vs.* FREDERICK HOPT, IMP., &C., APPELLANT. } From 3d dist.

In this cause the appeal from the order denying amendments to the record, and order refusing stay of execution came on for hearing, were argued by W. G. Van Horne for appellant, and W. H. Dickson for respondents, submitted, and taken under advisement. Thereafter the court being sufficiently advised on all matters in said cause submitted, it is now here ordered and adjudged that the judgment, order, and ruling of the district court refusing to allow what is termed an amendment to the record of said district court be and is affirmed, that the ruling and order of said district court refusing to stay execution be and is affirmed, that the judgement and sentence of said district court in said cause be and is hereby affirmed. To all and singular this judgement and order, appellant, by his counsel, excepts.

28 In the supreme court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH, respondents, *vs.* FREDERICK HOPT, INDICTED UNDER THE NAME of Fred. Welcome, impleaded with another appellant.

Notice of motion for a stay of execution.

To W. H. Dickson, esq., U. S. district attorney for Utah Territory:

You will please take notice that, on the 9th day of June, A. D. 1884, at the Federal court-room, in Salt Lake City, Utah Territory, at the hour of ten a. m., on said day, or as soon thereafter as counsel can be heard, upon the affidavit, a copy of which is attached hereto and served

herewith, appellant will move the court to stay and suspend the execution of the judgement of death heretofore rendered against said appellant, as is more particularly set forth in the written motion, a copy of which is hereto appended.

JUNE 7, 1884.

S. H. SNIDER AND
W. G. VAN HORNE,
Attorneys for Appellants.

29 In the supreme court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH, respondents, *vs.* FREDERICK HOPT, INDICTED UNDER THE name of Fred. Welcome, impleaded with another appellant.	Indictment for murder in the first degree.

Motion for a stay of execution.

Now comes said appellant, Frederick Hopt, by his counsel, and respectfully moves this honorable court to stay and suspend the execution of the judgement of death, heretofore on the 9th day of May, 1884, rendered against said appellant by the third district court of Utah Territory, until said cause shall be reviewed by the Supreme Court of the United States on writ of error, or until the further order of this court.

S. H. SNIDER AND
W. G. VAN HORNE,
Attorneys for Appellant.

30 In the supreme court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH, respondents, *vs.* FREDERICK HOPT, INDICTED UNDER THE name of Fred. Welcome, impleaded with another appellant.	Indictment for murder in the first degree.

Affidavit on motion for stay of execution.

TERRITORY OF UTAH,
Salt Lake County, ss:

W. G. Van Horne, being first duly sworn, deposes and says, I am one of the counsel of appellant in the above-entitled cause, said appellant has been convicted of the crime of murder, and has by the third district court of Utah Territory been sentenced to be shot to death on the 13th day of June, 1884. The judgement of said third district court aforesaid has been affirmed by this court. It is bona fide the intention of said appellant and his counsel to take said cause by writ of error to the Supreme Court of the United

States. The time fixed for the judgment of said district court to be executed, does not allow sufficient time for said writ of error to be passed
31 upon by the Supreme Court of the United States. The decision of said supreme court of Utah Territory, on said appeal was rendered on the 6th day of June, 1884, and further deponent saith not.

W. G. VAN HORNE.

Sworn to before me this 7th day of June, 1884.
[SEAL.]

E. T. SPRAGUE,
Clerk of Supreme Court.

(Endorsements:) People, &c., vs. Fred. Hopt. Mo. stay of execution. Filed June 7th, 1884. E. T. Sprague, clerk. Service of copy admitted this 7th day of June, '84. W. H. Dickson, U. S. Att'y.

32 MONDAY, *June 9th, A. D.* 1884.

A session of the supreme court of the Territory of Utah was held this day.

* * * * * * *

THE PEOPLE OF THE TERRITORY OF UTAH, respondents,
vs.
FREDERICK HOPT, IMP, &C., APPELLANT. } From 3d dist.

Upon an affidavit filed, showing intent to take this cause to the Supreme Court of the United States by writ of error, a motion to stay the execution in this cause was made, argued by Mr. Van Horne for appellant, Mr. Dickson for respondents, and submitted. Thereafter, the court being sufficiently advised thereon, it is now here ordered that said motion be, and the same is hereby, overruled and denied.

33 In the supreme court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH, respondents,
vs.
FREDERICK HOPT, INDICTED UNDER THE NAME of Fred. Welcome, impleaded with another, appellant. } Indictment for murder in the first degree.

Motion for a stay of execution.

Now comes said appellant, Frederick Hopt, by his counsel, and moves this honorable court to grant a stay and suspension of the execution of the judgement of death pronounced and rendered against said appellant on the 9th day of May, 1884, by the third district court of said Territory of Utah, in the case of The People of the Territory of Utah vs. Frederick Hopt, &c., in which case appellant was defendant, until the writ of error taking said cause to the Supreme Court of the United States can be heard and acted upon by said Supreme Court of the United States, or to a day fixed, to be settled by this honorable court, which will give said appellant time to com-

plete the necessary papers on said writ of error and get a stay in regular course from said Supreme Court of the United States. Said stay is
34 moved for on all the papers on file in this court in the above-entitled cause, and the records of said court, and on the affidavit and exhibit hereto annexed, attached to this motion and made a part hereof and marked Exhibit A, and on the writ of error issued out of the Supreme Court of the United States in said cause, a certified copy of which said writ of error is hereto attached, marked Exhibit B, and hereby made a part of this motion.

S. H. SNIDER AND
W. G. VAN HORNE,
Attorneys for Appellant.

35 EXHIBIT B.

In the supreme court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH, respondents, *vs.* FREDERICK HOPT, INDICTED UNDER THE NAME of Fred. Welcome, impleaded with another, appellant.	Indictment for murder in the first degree.

Affidavit of W. G. Van Horne on motion for a stay of execution.

TERRITORY OF UTAH,
County of Salt Lake, ss:

W. G. VAN HORNE, being first duly sworn, deposes and says:

I am one of the attorneys of said appellant, Frederick Hopt. On the 9th day of June A. D., 1884, I telegraphed to Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States, stating the title of the cause, that sentence of death had been passed, that judgement and sentence had been affirmed in the supreme court of Utah Territory, that execution was fixed for Friday, the 13th day of June, and that courts and justices of supreme court in Utah had refused stay or cetificate of probable cause, and that the governor had refused reprieve, and asking said Samuel F. Miller, associate justice as aforesaid of said Supreme
36 Court of the United States to telegraph a stay or recommendation therefor. I had previously telegraphed to the clerk of said Supreme Court of the United States, and from him had ascertained by telegram, that only Justices Miller and Field of the Supreme Court were then in Washington; that was on 7th day of June, 1884. On June tenth, 1884, I received a telegram from said Samuel F. Miller, which is hereto attached and made a part of this affidavit, and marked "Exhibit X," and further deponent saith not.

W. G. VAN HORNE.

Sworn to before me this 11th day of June, A. D. 1884.
[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court.

EXHIBIT X. 241.—*Dated Washington, D. C.*, 10.

JUNE 10*th*, 1884.

To W. G. VAN HORNE:

I have no authority make order in Hopt's case.

SAM'L F. MILLER.

37 EXHIBIT A.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of the judgement, order, and decree, in a suit which is in the said supreme court of the Territory of Utah, before you, in which the People of the Territory are plaintiffs and respondents, and Frederick Hopt, alias Frederick Welcome, impleaded with another, is defendant and appellant, manifest error hath happened to the great damage of the said Frederick Hopt; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second
38 Monday of October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court of the United State and the seal of the supreme court of Utah Territory this 9th day of June, A. D. 1884.

[SEAL.] E. T. SPRAGUE,
Clerk of the Supreme Court of Utah Territory.

Filed June 9, 1884.

E. T. SPRAGUE, *Clerk.*

(Endorsed:) People, &c., vs. Hopt. Mo. for stay of ex. Filed 11th June, 1884. E. T. Sprague, clerk.

TERRITORY of UTAH,
Salt Lake County, ss:

I, Ezra T. Sprague, clerk of the supreme court of said Territory of Utah, do hereby certify that the annexed and foregoing is a full, true, and correct copy of the writ of error issued June 9th, 1884, in the cause therein mentioned on file in my office.

In testimony whereof I have hereunto set my hand and the seal of said court, this 11th day of June, A. D. 1884.

[SEAL.] E. T. SPRAGUE, *Clerk.*

39 MONDAY, *June 9th, A. D.* 1884.

A session of the supreme court of the Territory of Utah was held this day.

* * * * * * *

THE PEOPLE OF THE TERRITORY OF UTAH, respondents,
vs.
FREDERICK HOPT IMP., &C., APPELLANT. } From 3d dist.

A writ of error and citation in this cause having been issued and the latter served, counsel for appellant now move for an order staying execution pending decision in the Supreme Court of the United States, and until the further order of this court, which motion is by counsel of the respective parties submitted, and thereupon ordered that said motion be, and it hereby is overruled and denied.

40 Supreme Court, Territory of Utah.

THE PEOPLE, ETC., PLAINTIFF,
vs.
FREDERICK HOPT, DEFENDANT.

The defendant is charged by the indictment in this case with the crime of murder, and upon trial the verdict was guilty of murder in the first degree.

From the judgment upon this verdict the defendant appeals to this court.

The record and judgment-roll only are before us. If they show apparent error to the detriment of the defendant, the judgment must be reversed; if they do not it should be affirmed.

The criminal procedure act of 1878, section 339, requires the clerk of the trial court, when judgment upon conviction is rendered, to annex together and file certain papers which shall constitute a record of action, among which is "a copy of the minutes of a challenge interposed to the panel of the trial jury, or to an individual juror, and the proceedings thereon."

The record shows that Silas F. Lake was called, examined, and "passed" by both parties as to his statutory qualifications, and sworn on his voir dire, and then the following statement: "challenged by the defendant for implied bias, denied by the prosecution, overruled, exception."

Construing this entry to mean that the juror was challenged by the defendant for implied bias; that the challenge was denied by the prosecution and overruled by the court, to which ruling the defendant at the time excepted, does it show error committed by the court?

A challenge for implied bias may be taken for any one or more of the causes mentioned in any one or more of the nine subdivisions of section 242 of the criminal procedure act of 1878; but section 244 requires that "one or more of the causes stated in sec. 242 must be alleged." Each one of the nine subdivisions of section 242 has at least one cause or ground for challenge not contained in either of the others, and therefore a chal-

lenge for "implied bias," without any specification as to the particular ground of the challenge is loose and indefinite, without point or certainty as to the real or alleged objection to the juror.

The court should be informed by the challenging party upon which one or more of the statutory grounds he relies; that the examination of the juror may be directed to some one or more of the particular grounds of objection allowed by the statute. "Unless the cause be alleged the challenge may be disregarded by the court. It is not enough to say I challenge the juror *juror* 'for implied bias,' and then stop. The particular cause from which bias is to be inferred must be stated. Such was the rule of the common law, and is the direction of the statute of this State." In the present case the challenges were interposed in general terms "for implied bias," without a specification of the particular causes; for this reason, if for no other, they were properly disallowed," is the language of the court in People vs. Reynolds, 16th Cal., 131, under a statute substantially, if not identically, like ours, and is sustained by every reason that can be urged in behalf of that certainty which should characterize all legal proceedings. (People vs. Dick, 37 Cal., 277; People vs. Hardin, 37 Cal., 258.)

David Archibald and another juror were sworn upon their voir dire, and in each case the following entry appears: "Challenged by the defendant for both implied and actual bias; both challenges denied by the prosecution and both overruled; exception."

Section 26 of the act of the Territorial legislature, approved March 13th, 1884, provides that "in a challenge for actual bias the causes stated in the second subdivision of section 241 must be alleged." The second subdivision of section 241 is as follows: "2. For the existence of a state of mind n the part of the juror which leads to a just inference in reference to the case that he will not act with entire impartiality which is known in this act as actual bias." We now consider the challenges for actual bias, and such questions as are common to both implied and actual bias; in making the challenges for actual bias no ground or cause whatever was alleged, and no effort was made to comply with section 26 of the act of 1884 in alleging the causes as there required; and the failure to comply with the statute in this respect is fatal. The mere assertion, "I challenge the juror for implied bias," or "I challenge the juror for actual bias," is no challenge, for the reason that the express requirements of the statute are ignored, there being no attempt to comply in substance or form to their explicit provisions; and the court might well at that time have ignored the declaration or position of counsel. But there is another feature of this subject. The record shows no examination of the challenged jurors upon their voir dire, or any testimony whatever presented either by the challenging or adverse party; and it is impossible to ascertain to what ruling or action of the court the exception of the defendant is taken. We cannot say the exception is taken to any statement admitted against objection, or that it was to the rejection of any offered testimony, for the record is silent as to the matter. If the record does not show that some question or matter was before the court, and that the court erroneously ruled thereon, we will not presume there was error to the detriment of defendant.

Although these principles, in our opinion, clearly settle all questions relied upon by the defense arising upon the challenges for actual or implied

bias made by the defendant, and the overruling of the same, we will not pass over without consideration the claim of the defense that the court should have appointed triers to try the challenges for actual bias, and that the trial of them by the court was error, available to the defendant in this court, although no exception was taken thereto in the district court.

Sections 246 to 253 of the criminal procedure act provide that challenges for actual bias shall be tried by triers appointed by the court for that purpose. (Hopt vs. Utah, 110 U. S., 574.) By sections 26, 27, and 28 of an act of the legislature of Utah, approved March 13th, 1884, entitled "An act amending an act regulating the mode of procedure in criminal cases, approved February 22d, 1878." The provisions of the criminal procedure act of 1878, requiring the court to appoint triers, and for the trial by triers of all challenges for actual bias, are repealed, and the court itself is required to try all such challenges, and the question is, was the act of March 13th, 1884, in force at the last trial of this case in the district court? If it was, the court committed no error in trying the challenges without intervention of triers appointed for that purpose. The act of January 19th, 1854, provides, "That each act and resolution is in force from the date of its publication in any public manner, unless a certain time is specified." (Compiled laws, page 78.)

The record is silent as to any publication of the amendatory statute of March 13th, 1884. It is a rule of law that courts will take judicial notice of the statutes and authoritive decisions of courts within their jurisdiction. We see no error committed by the court in this respect. (1 Kent's Com., 508.)

John Gillespie was "challenged for refusing to answer defendant's questions as to whether he was living in polygamy; refused. Exception."

This is a record entry as to this juror; the same in substance appears in the examination of another juror, from which it is claimed the court erred in refusing to allow the challenge.

Except in cases for bigamy or polygamy, no law has been cited to us and we have found none that requires the court to excuse a juror from service in the trial of a cause for the sole reason that he refused "to answer whether he was a polygamist or not." But construing the refusal of the juror to answer to be an admission that he was at the time a polygamist, was it error to overrule the challenge?

Section 5 of the 47th chapter of the statutes of the United States, approved March 22d, 1882, provides: "That in any prosecution for bigamy, polygamy, or unlawful cohabitation under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, 1st. That he is or has been living in the practice of polygamy or unlawful cohabitation with more than one woman."

Section 8 of the same act is as follows: "That no polygamist, bigamist, or any other person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place; or be eligible for election or appointment to, or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States."

Under this 8th section the defendant claims that the overruling of the challenge was error.

Under section 5 it is certain that a bigamist or polygamist is upon challenge for the reason that he is a bigamist or polygamist, in a prosecution for bigamy or polygamy, a disqualified juror; and section 8th is a disqualification of the same persons as voters, and disentitles them to hold any office or place of public trust, honor, or emolument, in, or under, or for this Territory, or under the United States.

If any doubt attaches to the words "office or place of public trust, honor, or emolument," under the claim of the defendant, that they include or should be construed to include the term "juror," then we may look at the whole act in determining the doubt, for the whole statute is to be taken together; and any and all parts of it may be read in connection with any particular clause to determine any doubt as to the intent or meaning of such clause; and effect if possible must be given to every sentence and word, and where a given construction would render a sentence or even a word redundant, caution should be exercised before such construction should be adopted; for it is not to be presumed that acts of Congress are composed of words thrown loosely together without due consideration of the effect or force which every word in its place has to every other clause or part of the act. If the language of section 8 includes in its proper and legal import the term "juror," then the part of section 5 above quoted is surperfluous and an inexplicable redundancy, idle words without effect, simply because the more general and comprehensive terms of section 8 include all and more than is comprised in the clear, emphatic, and express terms of section 5. As a matter of construction, we are of the opinion that the law is against the position taken by the defense, and proceed to the consideration of the question, "Does the language of section 8 include within its legal meaning and import the term or idea of 'juror'?" We are of opinion that it does not.

A trial juror in this Territory is a body of twelve men possessing the requisite qualifications, duly summoned, and sworn to well and truly try the questions of fact submitted to them by the court, and a true verdict render according to the law and the evidence. A juror is one of such body, and must be a citizen of the United States and possessed of certain qualifications; he is neither appointed or elected to his position of duty; his name is drawn from a list of 200 names prepared by the clerk of the district court and the judge of the probate court within and for the county where the district court is held. Such list is composed of names of citizens of the United States who can read and write in the English language, and have resided in the district six months next preceding the making of the list; and when duly summoned he must appear in court at the legally named time, or he by his default becomes (if without excuse) liable to the penalty imposed for disobedience to process of court; and for his services as such juror he is entitled to the mileage and per diem allowed by statute.

42 In United States vs. Hartwell, 6 Wall., 393, the court says, "An office is a public station or employment, conferred by the appointment of Government. The term embraces the ideas of tenure, duration, employments and duties." Mr. Bouvier, in his dictionary defines office to be "a right to exercise a public function or employment, and to take the fees and emoluments belonging to it."

"The idea of an office clearly defined embraces the ideas of tenure, duration, fees or emoluments, rights, and powers, as well as that of duty, a public employment confirmed by appointment of Government." (Burrill's Dictionary.)

In 20 Johns, R. 493, Platt, justice, defines office to be "an employment on behalf of the Government in any station or public trust, not mere transient, occasional, or incidental."

An office is defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it. (25 Cal., 98, People vs. Stratton, 28 Cal., 388.)

43 Jury duty is in the nature of service due from the citizen to the Government necessarily required in the administration of its laws; its character has but little similarity to tenure, duration, power, and the right to exercise powers conferred by the appointment of Government, which are "essential characteristics of office," and not "mere transient, occasional, or incidental." The name of the man is selected and with 199 others is placed in a box which is denominated a "jury box," from which it is drawn by chance, and without his knowledge of any previous steps he is summoned to appear in court to perform the duty of a juror; it is true he has a duty of a public nature to perform, and for it he is compensated out of the public treasury, but in what other respect does his position or his duties correspond with the essential elements of office? He has no certain tenure of office. He has no right to, and has no power to enforce a right to, the performance of any act or service which constitutes the performance of official duty. He is liable at any moment to be discharged by the court from all service, and to be excused by either party from serving in the trial of any cause without consulting his wishes or interests. The oath he takes, in its terms and scope, limits his duty to the facts of the particular case then on trial, and is not the oath required by the laws of this Territory, or by the Constitution and laws of the United States to be taken by public officers. (State vs. Leonard, 48 Conn., 535.)

The position of a juryman is to a certain extent a "place of public trust and emolument," but not in the sense of these statutory provisions.

A witness summoned in behalf of the people is entitled to the mileage and per diem allowed by law in substantially the same manner as a juror; a man called upon by the United States marshal, or by a sheriff to aid in the preservation of the public peace, or to assist temporarily in the performance of an act or duty of a public nature, is asked to hold for the time being a place of public trust and emolument; and although both of the persons are within the classes described in sections 5 and 8, it will hardly be claimed that one must be excluded from the witness stand, and the other not permitted to assist in the preservation of the public peace. The law carefully and expressly excludes bigamists and polygamists from juries, when challenged in the trial of bigamy or polygamy cases, for the reason that they are of this class of persons.

If it was the intention of Congress to prohibit them from the performance of jury duty in all cases, the use in section 8 of appropriate language, would have done it; or such as is in section 5 would have enabled either party by challenge to exclude them from any partiular case. It is not probable that Congress would, in the guarded and carefully expressed terms

of section 8, have allowed by challenge the exclusion of bigamists and polygamists from juries in cases of bigamy and polygamy only, and afterwards in the same act, in general terms, exclude all bigamists from all juries without reference to the character of the cases.

Apparently, section 8 was not intended to, and it does not affect the qualification of jurors, and we cannot, by construction, interpolate into it a provision foreign to its evident objects and purposes, not by fair construction implied, as we would if the position of the defense should be sustained.

The judgment of the district court is affirmed and the case remanded.

STEPHEN P. TWISS,
Associate Justice.

HUNTER, *C. J.*,
EMERSON, *A. J.*, concur.

Filed July 11th, 1884.

E. T. SPRAGUE, *Clerk.*

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, greeting:

Because, in the record and proceedings, as also in the rendition of the judgement, order, and decree, in a suit which is in the said supreme court of the Territory of Utah, before you, in which the people of the Territory of Utah are plaintiffs and respondents, and Frederick Hopt alias Frederick Welcome impleaded with another, is defendant and appellant, manifest error hath happened to the great damage of the said Frederick Hopt.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgement be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States,
45 together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court of the United States, and the seal of the supreme court of Utah Territory the 9th day of June, A. D. 1884.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Filed June 9th, 1884.

E. T. SPRAGUE,
Clerk.

46 In the supreme court of Utah Territory. June term, 1884.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER THE NAME of Fred. Welcome, impleaded with another.

Citation.

The United States of America to the People of the Territory of Utah, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, District of Columbia, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein Frederick Hopt, indicted under the name of Fred. Welcome, is plaintiff in error, and the People of the Territory of Utah defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John A. Hunter, chief justice of the su-
47 preme court of Utah Territory, this the 9th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

JOHN A. HUNTER,
Chief Justice of Supreme Court of the Territory of Utah.

Attest:

[SEAL.] E. T. SARAGUE,
Clerk of Supreme Court, and with the seal thereof.

TERRITORY OF UTAH,
County of Salt Lake, ss:

W. G. Van Horne, being first duly sworn, depose sand says that he is one of the attorneys for said Frederick Hopt, indicted under the name of Fred. Welcome, the plaintiff in error herein; that on the 9th day of June, 1884, he delivered a true copy of the foregoing citation to W. H. Dickson, esq., the United States district attorney for Utah Territory at the county and Territory aforesaid.

W. G. VAN HORNE.

Subscribed and sworn to before me July 9th, A. D. 1884.
JOHN A. HUNTER,
Chief Justice of Utah.

I hereby accept service of the foregoing citation at Salt Lake City, Utah Territory, this 9th day of June, 1884.

W. H. DICKSON,
United States District Attorney for Utah Territory.

48 UNITED STATES OF AMERICA:

In the Supreme Court of the United States in error to the supreme court of the Territory of Utah.

FREDERICK HOPT, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH, defendants in error.

TERRITORY OF UTAH,
County of Salt Lake, ss:

This affiant, William G. Van Horne, makes oath and says, that at the request of said above-named plaintiff in error and his assigned counsel, Solomon H. Snider, he appeared as counsel, together with said Solomon H. Snider, for said plaintiff in error, and was by the court associated as counsel for said plaintiff in error; that he has not received any compensation or reward as attorney in said cause, and has not the promise or hope of reward for any services rendered or that he may render in said cause, nor hope or expectation of being reimbursed for the sums affiant has necessarily expended out of his own means in the conduct of said cause; that as this affiant is informed and believes, said plaintiff in error is a pauper and
49 wholly unable to employ counsel or to pay the costs of the trial.

WM. G. VAN HORNE.

Sworn to before me this 17th Sept., 1884.
[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Filed Sept. 17th, 1884.

E. T. SPRAGUE, *Clerk.*

50 UNITED STATES OF AMERICA:

In the Supreme Court of the United States in error to the supreme court of Utah.

FREDERICK HOPT, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH, defendants in error.

TERRITORY OF UTAH,
County of Salt Lake, ss:

This affiant, Solomon H. Snider, being first duly sworn upon his oath, says, I was assigned by the district court in and for the third judicial district of Utah Territory, to the defence of Frederick Hopt, the above-named plaintiff in error. I have not received any compensation or reward as attorney in said cause, and have not the promise or hope of reward for any

services rendered or that I may render in said cause, that as affiant is informed and believes said plaintiff in error is a pauper and unable to employ counsel or to pay the costs of the trial.

SOLOMON H. SNIDER.

Subscribed & sworn to before me Sept. 17th, 1884.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

51 Filed Sept. 17th, 1884.

E. T. SPRAGUE, *Clerk.*

52 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of the writ of error hereto attached, do return herewith said writ, the citation issued thereon, and a transcript of the record and proceedings, and of the opinion in and of said court in the cause in said writ described on the appeal from the judgement therein, to the Supreme Court of the United States, and I hereby certify that said attached transcript of the record, proceedings, and opinion aforesaid, is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

Witness my hand and the seal of said supreme court of said Territory, at Salt Lake City this 23d day of September, A. D. 1884.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Indorsement on cover:) No. 1141. Frederick Hopt, plaintiff in error, vs. The People of the Territory of Utah. Utah Territory supreme court. Filed 20th October, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1141.

114-488

FREDERICK HOPT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

CERTIORARI AND RETURN.

Filed March 25, 1885.

1 In the district court in and for the third judicial district of Utah Territory, Salt Lake County.

Motion for stay of execution.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED UNDER THE name of Fred. Welcome, impleaded with another.	Indictment for murder in the first degree.

Bill of exceptions.

Be it remembered that on the 31st day of May, 1884, the defendant made the following motion for a stay of execution in said cause, and the following order of the court fixing the time of hearing the same was made and entered, as appears of record in said cause:

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, IMP., &C.	Murder.

Defendant makes an oral motion for stay of execution herein, and in arrest of judgment upon the grounds that an appeal has been taken
2 and is pending in the Supreme Court; and the hearing of said motion is set for Tuesday, June 3d, 1884.

In the district court in and for the third judicial district of Utah Territory, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER THE name of Fred. Welcome, impleaded with another.

Motion for a stay of execution.

Now comes said defendant, by his counsel, and respectfully moves said court to grant an order in said cause postponing and staying the execution of the judgment of death heretofore, on the 9th day of May, 1884, rendered therein against said defendant, pending the appeal heretofore taken in said cause to the supreme court of Utah Territory, and until the further order of the court.

This motion is made on the following grounds, to wit:

3 I. The act of Congress of the United States, approved June 23d, 1874, entitled "An act in relation to courts and judicial officers in the Territory of Utah," contains the provision: "A writ of error from the Supreme Court of the United States to the supreme court of the Territory shall lie in criminal cases where the accused shall have been sentenced to capital punishment or convicted of bigamy or polygamy."

In reference to this provision it should be observed—

(1) That it is mandatory. The words "shall lie" give the writ as a matter of course and of right, and not as of favor.

(2) That it is unqualified. No condition of any kind or nature must be complied with to obtain this right.

(3) It contemplates the supreme court of Utah as having passed on the appeal in such cases from the district court, before the writ issues from the Supreme Court of the United States.

4 II. Said act of Congress was passed in contemplation and in aid of the then existing laws of Utah. In this connection it should be observed—

(1) That the laws of Utah then existing provided for an appeal from the district court to the supreme court of the Territory without any conditions being annexed to the right of appeal or to the stay of execution necessarily incident thereto.

(2) The unqualified and unconditioned right of appeal to the supreme court of Utah from the judgment of the lower court, and likewise the unqualified and unconditioned stay of execution necessarily incident thereto, was supplemented by said act of Congress which indisputably contemplates a stay of execution until the writ of error provided for in said act can be heard and determined in the Supreme Court of the United States. If any other construction be adopted, it would imply the

5 manifest absurdity of Congress passing an act to give the right to have a capital case reviewed on writ of error by the Supreme Court of the United States and neither providing for, nor contemplating as already provided for, a stay of execution, which alone would make the right given of any value, an absurdity the more striking since it must have been well known to Congress that a suggestion of the death of the accused would be sufficient to prevent the Supreme Court of the United States from taking any action on the writ of error.

(3) The statutes of Utah supplemented as aforesaid by said act of Congress gave to the accused, sentenced to death, an absolute, unconditional, and vested right of having the judgment in his case reviewed first by the supreme court of Utah Territory and then by the Supreme Court of the United States, and of having stay of execution pending such review of his
6 case by the Supreme Court of the United States, which alone could make the right of any value. The act of Congress clearly contemplated the statutes then in force in Utah regarding appeals in such cases, and in supplementing them by the act above quoted gave sanction and authority to them, as then existing and in effect made them a part of the act of Congress.

(4) Under said act of Congress and the then existing laws of Utah the right of having a capital case reviewed in the supreme court of Utah Territory and then in the Supreme Court of the United States became an unconditional and vested right, carrying with it its necessary incident of a stay of execution, which was within the reason of the act of Congress and was contemplated by it.

The sanction thus given by Congress by said act to the then existing law of Utah Territory providing for an appeal to the supreme court of said Territory as a matter of course and with the incident of a
7 stay of execution made such law as authoritative as if the provisions of it had been expressly enacted by Congress.

III. The acts of Congress control the action of the Utah legislature, and the laws enacted by that body, and any act passed by said legislature in contradiction to or in conflict or inconsistent with the acts of Congress or the laws of Utah contemplated and sanctioned by an act of Congress, is void and of no force or effect.

Now, stay of execution in a capital case appealed to the supreme court of Utah Territory, being a matter of course under the laws of Utah at the time of the passage of said act of Congress, and being contemplated by Congress in passing said act, and sanctioned and indorsed thereby as a then existing absolute and vested right, the act of the Utah Legislature providing that execution shall be stayed only on filing with the clerk of
8 the court in which judgment was rendered a certificate of probable cause, signed by the judge of said court or one of the justices of the supreme court of Utah Territory, as applied to criminal cases, when the accused has been sentenced to capital punishment, is against the reason and spirit of said act of Congress, and in contradiction thereto and inconsistent therewith, and against the provisions of the law of Utah, sanctioned and confirmed thereby, in this, that while the said act of Congress gave to the accused in the cases provided for the absolute right of having his case reviewed by the highest tribunal in the land, and the accompanying and the necessarily incident right of having the execution of the judgment stayed until such tribunal had passed upon the case, the law of Utah, by requiring a certificate of probable cause not contemplated by said act of Congress to stay execution, deprives him of such right, in effect saying
9 to him, "Your right to have your case reveiwed by the Supreme Court of the United States cannot be taken away by a statute of Utah Territory, but a statute of Utah Territory can render that right an empty and vain one by executing you before your case can be reveiwed by the Supreme Court of the United States, and then suggesting your death

as a reason why the said Supreme Court should not review the judgment of the supreme court of the Territory in your case." The statute of Utah of 1878 attempts to do exactly that by only giving the stay of execution pending the decision of such Supreme Court upon conditions, and those conditions wholly beyond the power of the accused to control; hence it is wholly and utterly void.

S. H. SNIDER and
W. G. VAN HORNE,
Attorneys for Defendant.

Title of court and cause: Motion for a stay of execution. Filed June 2d, 1884.

O. J. AVERILL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

10 That on the 3d day of June, A. D. 1884, the said district court made the following order overruling the said motion for a stay of *of* execution:

TUESDAY, *June 3d, A. D.* 1884.

Court sat pursuant to adjournment and was opened for business in due form. Present, Hon. John A. Hunter, the U. S. attorney, and the officers of court.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED IN THE NAME OF of Fred. Welcome, and impleaded with another. } Murder.

The motion of def't Hopt for a stay of execution upon the judgment herein coming on to be heard is argued by Snyder and Van Horne for defendant, and by W. H. Dickson for the prosecution, and it appear-
11 ing to the court that defendant has taken an appeal to the supreme court of said territory from the judgment in said cause, and that the case has passed beyond the jurisdiction of this court by reason of such appeal, it is ordered that said motion for stay of execution be, and the same is hereby, overruled and denied, to which ruling and order defendant duly excepted.

That the foregoing is agreed upon and settled by and between W. H. Dickson, the U. S. dist. attorney for Utah Territory, and the counsel for said defendant, as being all the motions, order, or proceedings made and had in said hearing of said motion in said cause, and it is agreed that the same may be signed and settled by the judge of said court as the bill of exceptions therein on said motion.

And the defendant prays that the same may be settled and signed and made of record in said cause, and it is done accordingly this 6th
12 day June, 1884, after judgment has been rendered in said cause.

JOHN A. HUNTER,
Judge of the 3d Judicial District Court of Utah.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, O. J. Averill, clerk of the third judicial district court of Utah Territory, do hereby certify that the following is a true, full, and correct copy of the original bill of exceptions of def't on denying motion for stay of execution in the above-entitled action filed in my office.

Witness my hand and the seal of said court at Salt Lake City this 6th day of June, A. D. 1884.

[SEAL.]

O. J. AVERILL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

(Indorsed:) The People, &c., vs. F. Hopt. Bill of exceptions. Filed June 6th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

13 In the district court of the third judicial district of Utah, Salt Lake County.

Notice of appeal froman order made June 3, 1884, overruling motion for a stay of execution.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER THE NAME of Fred. Welcome, &c.

To the clerk of said district court and to W. H. Dickson, U. S. district attorney for Utah Territory.

Please take notice that the defendant in the above-entitled cause hereby appeals to the supreme court of Utah Territory from an order made and entered in said cause in said district court on the 3d day of June, A. D. 1884, denying defendant's motion for a stay of execution against said defendant in said cause, and from the whole of said order.

S. H. SNIDER, and
W. G. VAN HORNE,
Att'ys for Defendant.

(Endorsed:) Title of court and cause notice of appeal filed June 5, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk. Service
14 of copy accepted June 5th, 1884. W. H. Dickson, att'y for the people.

15 THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED IN THE NAME OF Fred. Welcome, and impleaded with another. } Murder.

The motion of defendant Hopt for a stay of execution upon the judgment herein coming on to be heard, is argued by Snider and Van Horne for defendant, and by W. H. Dickson for the prosecution; and it appearing to the court that the defendant has taken an appeal to the supreme

court of said Territory from the judgment in said cause, and that the case has passed beyond the jurisdiction of this court by reason of such appeal:

It is ordered that said motion for a stay of execution be, and the same is hereby, overruled and denied. To which ruling and order defendant duly excepted, June 3d, 1884.

16 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, O. J. Averill, clerk of the third judicial district court of Utah Territory, do hereby certify that the following is a full, true, and correct copy of the original motion for stay of execution, order denying motion, and notice of appeal in the above-entitled action filed in my office.

Witness my hand and the seal of said court at Salt Lake City this 6th day of June, A. D. 1884.

[SEAL.]

O. J. AVERILL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

(Indorsed:) People, &c., vs. Fred. Hopt. Bill of exceptions. Filed June 6th, 1884. E. T. Sprague, clerk.

17 TERRITORY OF UTAH,
Salt Lake County, ss:

I, Ezra T. Sprague, clerk of the supreme court of said Territory of Utah, do hereby certify that the annexed and foregoing is a full, true, and correct copy of the transcript of the record and proceedings in the cause therein described on an appeal from an order denying stay of execution, on file in my office.

In testimony whereof I have hereunto set my hand and the seal of said court this 19th day of March, A. D. 1885.

[SEAL.]

E. T. SPRAGUE,
Clerk.

18 In the district court in and for the third judicial district of Utah Territory, Salt Lake County.

Motion to amend record.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED UNDER THE NAME of Fred. Welcome, impleaded with another.	Indictment for murder in the first degree.

Bill of exceptions.

Be it remembered that on the 20th day of May, 1884, defendant by his counsel made and filed with the clerk of said court the following motion to amend the record in said above-entitled cause, theretofore tried in said court, viz:

In the district court in and for the third judicial district of Utah Territory, Salt Lake County.

Motion to amend record.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED UNDER THE NAME of Fred. Welcome, and impleaded with another. } Indictment for murder in the first degree.

19 Now comes the said defendant Frederick Hopt, by his counsel, and respectfully moves said court to amend the record in the above-entitled case by inserting therein the proceedings on the challenges to jurors A. J. Pendleton, John Willoughby, and John Gillespie, including so much of the examination of said jurors on their voir dire as may be necessary to show the grounds of each of said challenges and the decisions thereon, so that said record may conform to the provision of subdivision three, of section 339 of the criminal proceedure act of Utah Territory. The following amendments of said record *as* asked for, to wit:

In the examination of said juror A. J. Pendleton, the following answers to questions put by counsel for defendant, as follows:

Q. Have you formed or expressed an opinion as to the guilt or innocence of defendant?

Ans. Yes, sir; I have formed an opinion from what I have read.

20 Q. Is it such an opinion as it would require sworn evidence to remove?

Ans. Yes; it would require evidence to remove it.

In the examination of Juror John Willoughby, the following answers to questions put by counsel for defendant, to wit:

Q. Do you know anything about the case?

Ans. Only what I have read about it in the papers.

Q. Have you talked with any one who purported to know the facts of the case of their own knowledge?

Ans. No, sir; only with persons who had read of it.

Q. Have you ever formed or expressed an unqualified opinion as to the guilt or innocence of defendant?

Ans. I have never expressed an opinion that I know of.

Q. Have you formed an opinion?

Ans. Yes, sir.

Q. Was it such an opinion as it would require sworn evidence to remove?

21 Ans. Yes, sir; strong evidence.

In answer to questions put by the U. S. district attorney for Utah Territory, the following answers in substance:

Q. Mr. Willoughby, you say you have no knowledge of the case except what you have learned from reading the newspaper accounts?

Ans. No, sir; none whatever.

Q. From what you read, do you say you formed an opinion as to the guilt or innocence of the defendant?

Ans. Well, sir, I have an idea about it.

Q. Was your idea a fixed, settled opinion, or was it a conditional hypothetical one, based on the truth or falsity of what you had read?

Ans. It was based upon the truth or falsity of what I had read.

Q. In trying this case, would you allow any opinion you may
22 have formed to influence you, or would you be governed wholly by the evidence?

Ans. I would try to be governed by the evidence.

Q. But would you?

Ans. Yes, sir; I think I would.

Q. Mr. Willoughby, you will be sworn to try this case according to the evidence; now would you allow yourself to be influenced by your opinion in this trial?

Ans. No, sir; I would not.

Q. Would you try the case fairly and impartially?

Ans. Yes, sir.

In answer to redirect examination by counsel for defendant, on challenge for actual bias, the following answers:

Q. Mr. Willoughby, you say you have formed an opinion as to the guilt or innocence of defendant?

Ans. Yes, sir; I have.

Q. Is it such an opinion that it would require sworn evidence to remove it?

Ans. Yes, sir; pretty strong evidence.

Q. Have you that opinion still?

23 Ans. Yes, sir.

Q. Have you any actual prejudice against the defendant?

Ans. No, sir.

On the examination of the juror, John Gillespie, the following proceedings:

Question by counsel for defendant:

Q. Mr. Gillespie, are you a bigamist or polygamist? (By the juror to the court) "Am I bound to answer that question?

Instruction from court that he was bound to answer no question which, if answered, would tend to criminate him.

Q. Mr. Gillispie, are you a bigamist or polygamist?

Juror refused to answer, and was challenged for lack of general qualifications; challenge disallowed and exception taken. Also, that the record show that challenges for actual bias were denied by the court, and that such other and further amendments be made in the record on the points above referred to as may be consistent with the truth and neces-
24 sary to conform the said record to the statute above referred to.

S. H. SNIDER and
W. G. VAN HORNE,
Atty's for Defendant.

(Endorsed:) Title of court and cause filed May 20th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Without waiving any objection to the right of defendant to make said motion, service of copy accepted this 20th day of May, 1884, is admitted. W. H. Dickson, U. S. dist. att'y.

And on the said 20th day of May the said district court made the first order hereinafter set forth, and on the 26th day of May made the second

order hereinafter set forth, each of said orders relating to the hearing of said motion to amend record, and extending the time for the clerk to transmit the transcript on appeal in said case.

25 THE PEOPLE OF THE TERRITORY OF Utah *vs.* FREDERICK HOPT. } Murder.

The defendant having filed his motion to amend record, and objection being made thereto, it is, by consent, ordered that defendant have until and including Monday, May 26th, 1884, within which to amend the said motion, and within which to prepare and transmit transcript on appeal to the Supreme Court.

MONDAY, *May 26th, A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, &c., IMPLEADED WITH another. } Murder.

The time for hearing the motion to amend the record herein is extended until May 30th, 1884, and the time for the clerk to transmit the transcript on appeal herein is accordingly extended.

26 That on the 31st day of May, 1884, the said third district court made the following order overruling the defendent's said order to amend the record in said case.

SATURDAY, *May 31st, A. D.* 1884.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, IMP., &C. } Murder.

The motion of defendant to amend the record of the proceedings in this case is argued by W. G. Van Horne & S. H. Snider for def't, and by W. H. Dickson for prosecution, and the court being now fully advised, orders that said motion be, and the same is hereby, overruled and denied.

To which ruling and order def't duly excepted.

The foregoing is settled and agreed between the counsel for the people in said cause and the counsel for defendant as a true and correct
27 copy of all motions, orders, and proceedings made and had on said motion to amend the record in said case, and may be signed and settled by the judge of said court as the bill of exceptions on said motion. And the defendant prays that the same may be settled and signed and made of record in said cause, and it is done accordingly this 6th day of June, 1884, after judgment has been rendered in said cause.

JOHN A. HUNTER,
Judge of 3d Judicial District Court of Utah.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, O. J. Averill, clerk of the third judicial district court of Utah Territory, do hereby certify that the following is a full, true, and correct copy of the original bill of exceptions of def't from motion overruled,
28 to amend record in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 6th day of June, A. D. 1884.

[SEAL.] O. J. AVERILL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

(Indorsed:) People, &c., vs. F. Hopt. Bill of exceptions. Filed June 6th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

In the district court of the third judicial district of Utah, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER THE
29 name of Fred. Welcome, impleaded with another.

Notice of appeal from an order made May 31st, 1884, overruling motion to amend the record.

To the clerk of said district court and to W. H. Dickson, U. S. district attorney for Utah Territory:

Please take notice that the defendant in the above-entitled cause hereby appeals to the supreme court of Utah Territory from an order made and entered in said cause in said district court on the 31st day of May, A. D. 1884, denying defendant's motion to amend the record in said cause and from the whole of said order.

S. H. SNIDER and
W. G. VAN HORNE.

(Endorsed:) Title of court and cause. Filed June 5, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk. Service of copy accepted June 5th, 1884. W. H. Dickson, att'y for The People.

30 THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, IMPLICATED WITH ANOTHER. } Murder.

The motion of defendant to amend the record of the proceedings in this case is argued by W. G. Van Horne & S. H. Snider, for def't, and by W. H. Dickson, for prosecution, and the court, being now fully advised, orders that said motion be, and the same is, hereby overruled and denied. To which ruling and order defendant duly excepted May 31, 1884.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, O. J. Averill, clerk of the third judicial district court of Utah Territory, do hereby certify that the following is a full, true, and correct copy of the original motion to amend record and order overruling motion and notice of appeal in the above-entitled action filed in my office.

31 Witness my hand and the seal of said court, at Salt Lake City, this 6th day of June, A. D. 1884.

[SEAL.] O. J. AVERILL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

(Indorsed:) People, &c., vs. Fred. Hopt. Bill of exceptions. Filed June 6th, 1884. E. T. Sprague, clerk.

TERRITORY OF UTAH,
Salt Lake County, ss:

I, Ezra T. Sprague, clerk of the supreme court of said Territory of Utah, do hereby certify that the annexed and foregoing is a full, true, and correct copy of the transcript of the record in the cause therein described, on the appeal therein from an order denying a motion to amend the record, on file in my office.

In testimony whereof, I have hereunto set my hand and the seal of said court this 19th day of March, A. D. 1885.

[SEAL.] E. T. SPRAGUE,
Clerk.

32 TERRITORY OF UTAH
County of Salt Lake, ss:

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in obedience to the annexed writ, do hereby certify that I have made diligent search and examination in and through the transcript of the record and proceedings in the cause in said writ described, on which the appeal from the judgment and order denying new trial was heard in said supreme court of Utah Territory; that in said transcript I find and certify that there is no copy of a motion to amend record, order overruling motion to amend record, orders on motion to amend record, overruling, &c., or motion for stay of execution, or order denying stay of execution in the third judicial district court, or any thereof.

I further certify that I find on file in my office transcripts appearing as separate transcripts of the record and proceedings, and on separate
33 and distinct appeals in the same said cause, from orders described hereinbefore and in said writ; certified copies of which said last-mentioned transcripts I return herewith, attached hereto; the endorsements thereon showing the date of the filing thereof in my office.

Witness my hand and the seal of said court, this 19th day of March, 1885, at Salt Lake City.

[SEAL.] E. T. SPRAGUE,
Clerk.

34 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme
[SEAL.] court of the Territory of Utah, greeting:

Whereas, in a certain suit in said supreme court between Frederick Hopt, appellant, and The People of the Territory of Utah, respondents, which suit was removed to the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, it appearing to the court that there is a diminution of the record and proceedings of said cause, to wit:

"Motion to amend record, order overruling motion to amend record, orders on motion to amend record, overruling, &c., motion for stay of execution," and "order denying stay of execution," in the third
35 judicial district court, are omitted from said transcript.

You, therefore, are hereby commanded that searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find, to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court on the first Monday in April next.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of March, A. D. 1885.

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

(Indorsed:) Supreme Court U. S. 1884. October term. No. 1141. Frederick Hopt, pl'ff in error, vs. The People of the Territory of Utah. Writ of certiorari and return.

(Stamped:) Office Supreme Court U. S. Filed Mar. 25, 1885. James H. McKenney, clerk.

114-486

Office Supreme Court U. S.
FILED
JAN 12 1885
JAMES H. McKENNEY

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1884.

No. 1141.

FREDERICK HOPT, Plaintiff in Error,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR.

R. N. BASKIN,
S. H. SNIDER,
W. G. VAN HORNE,
Attorneys for Plaintiff in Error

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1884.

FREDERICK HOPT, Plaintiff in Error,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error was indicted for murder in the first degree by the Grand Jury of the Third Judicial District of the Territory of Utah, on the 11th day of December, 1880; was afterwards arraigned and pleaded not guilty. He has been three times tried under said indictment. His last trial began on the 28th day of April, 1884, and on the 5th day of May, 1884, the jury found him guilty of murder in the first degree, and on the 9th day of May,

aforesaid, the Court rendered judgment against the defendant, (said plaintiff in error) and sentenced him to be shot. This judgment was affirmed by the Supreme Court of Utah Territory on the 6th day of June, 1884, and the plaintiff in error thereupon sued out this writ of error.

ASSIGNMENT OF ERRORS.

The Supreme Court of Utah erred in affirming the judgment of said District Court wherein and whereby it was adjudged that the said plaintiff in error should be shot until he was dead, for the following reasons and assignment of errors, to-wit:

I. The record showed error in that it did not comply with the Statute of Utah requiring that the written charges of the Court should form part of the record of the action.

II. The record showed error in that it did not comply with the Statute of Utah requiring that such record should contain "a copy of the minutes of a challenge interposed to the panel of the trial-jury or to an individual juror, and the proceedings and decision thereon."

III. The Court erred in trying challenges by defendant for actual bias, instead of appointing triers as required by law.

IV. The Court erred in deciding that the time had passed for filing the bill of exceptions in said cause.

V. The Court erred in disallowing defendant's challenges to jurors John Gillespie and Joseph C. Hamilton, for refusing to answer whether they were living in polygamy or not.

FIRST.

The record before the Supreme Court of Utah was fatally defective and insufficient to support the judgment of the Court affirming the judgment of the Third District Court.

Sec 257, Laws of Utah of 1878, provides: 7 The judge must then charge the jury, if requested by either party; he may state the testimony and declare the law, but must not charge the jury in respect to matters of fact, and in each case he shall inform the jury that they are the sole judges of the credibility of the witnesses, the weight of the evidence and of the facts; such charge must be reduced to writing before it is given, unless by mutual consent of the parties it is given orally.

SEC. 284. In charging the jury the Court "must state to them all matters necessary for their information." * * *

SEC. 315. "When written charges have been presented, given or refused, the questions presented in such charges need not be excepted to, or embodied in a bill of exceptions, but the written charges, or the report with the endorsements showing the action of the Court form part of the record, and any error in the decision of the Court thereon, may be taken advantage of on appeal in like manner, as if presented in a bill of exceptions."

SEC. 339, Laws 1878, provides: "* * * The Clerk must, within five days, annex together and file the following papers which constitutes a record of the action."

"8. A copy of all charges given and of the endorsements thereon."

It is contended, on behalf of the plaintiff in error, that these provisions are mandatory as to the duty of both Judge and Clerk; that they prescribe certain positive duties which must be performed, and that the record must show that such provisions have been complied with, or the failure to show it constitutes error *per se*, which is sufficient to reverse the judgment.

The plain intent of the law is that the record should show all the charges and rulings of the Court on matters of law, except only such as pertain to the admission or rejection of evidence.

The record shows that the Court did charge the jury and that the charge was excepted to.

Transcript, p. 9.

The record does not contain anything to show that a mutual consent was given to an oral charge, and without such express consent an oral charge is error.

People *vs.* Trim, 37 Cal., 274.
People *vs.* Sanford, 43, Cal., 29.
People *vs.* Max, 45 Cal., 254.
People *vs.* Bamberger, 45 Cal., 650.
People *vs.* Prospers, 44 Cal., 186.

That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody to object to unauthorized methods.

Hopt *vs.* Utah, 110 U. S., 578.

But leaving the instructions out of the record deprives defendant of the important right of reviewing error in the charge given by the Court, and is an unauthorized method. Besides, the Statute commands that the Court should perform the positive duty of charging the jury that they are "the sole judges of the credibility of witnesses, etc." The provision that such charge must be part of the record, makes it imperative that the record should affirmatively show that the provisions of the Statute had been complied with.

The defect in the record cannot be excused by presuming negligence on the part of the Clerk, for the Statute command him to file a copy of the charges as a part of the record of the action.

California decisions, holding that absence of instructions from the record did not constitute error sufficient to reverse, were rendered under the old Criminal Practice Act, which provided that the judgment roll should contain:

"7. The written charges asked of the Court, if there be any."

Hittell's Gen. Laws of Cal., Sec. 2049.
Sec. 462, Crim. Practice Act.

There was no other provision for instructions or charges appearing in the record, unless brought there by a bill of exceptions.

Under this Statute, the Court's charge to the jury of its own motion was not part of the judgment roll.

People *vs.* Hait, 44 Cal., 598.

And no advantage could be taken of error in such charge, unless there was a bill of exceptions.

Nor did Sec. 362 of that act impose any instructions as to charging the jury, except not to charge them in respect to matters of fact. It did not command any express charge to be given as is the case under our Statute.

Such charge being positively enjoined and required by Statute to be in writing and be a part of the judgment roll; if the roll does not show compliance with the Statute the defect is fatal.

The presumption of regularity in the proceedings of courts of general jurisdiction cannot avail to cure defects in the record where such defects could only be caused by a failure to comply with the plain and imperative provisions of the Statute. In the case at bar the record could not fail to contain the charge to the jury, unless it were given orally, in violation of the Statute, or were unlawfully left out of the record.

But even if such presumption should be relied on in this cause, it is wholly destroyed by the fact that the record shows affirmatively that a motion was made in the court below to amend the record, and was overruled, and the order overruling the same affirmed by the Supreme Court of Utah.

Transcript, p. 11.

If it be held that the absence of such charge was error, the motion will be conclusively presumed to have

been directed by such defect. In this case this Court, will take notice of the fact that the District Court decided that the time had passed for filing the bill of exceptions.

Transcript, p. 9.

Also of the further fact shown by the record, that no stay of execution was granted in any Court in Utah, although application was repeatedly made therefor.

Transcript, 11, 12, 13 and 14.

And that therefore there was no time for a *cetiorari* to be sued out.

SECOND.

SEC. 339, Laws of 1878, provides what shall be filed by the Clerk as record of the action. Subdivision 3 of said section is as follows:

"3. A copy of the minutes of a challenge interposed to the panel of the trial jury, or to an individual juror and the proceedings and decisions thereon."

The record fails to comply with this provision, which is mandatory. The plain object of the Statute is to have the record show that the trial has been regularly pursued, and no "unauthorized methods" followed.

It is held by the Supreme Court of Utah that because the minutes kept by the Clerk in this case do not show in what form challenges were made, and the particular ground of the challenge is not there stated, that the Statute requiring the specific ground to be stated has not been complied with, and that consequently no challenge was made that the Court might not properly ignore. It is further urged that no evidence being before said Court as to the grounds upon which the lower Court overruled the challenge, no review can be had of that action

It is contended by the plaintiff in error, that under the above provision of the Statute, the Clerk should not only keep minutes showing expressly under what section the challenge was made, and the specific ground on which

it was based, but also the answers given by the juror, which were relied upon to sustain the challenge, and that is the obvious meaning of the words "challenge, proceedings and decision."

The Court takes the record challenge of juror Silas T. Lake as a basis and illustration of its argument.

A few extracts from the record are needed to illustrate that argument:

Transcript, p. 3.

"Silas T. Lake challenged by defendant for implied bias; denied by prosecution; overruled; exception."

"S. H. Clawson challenged by defendant for implied bias; allowed; juror excused."

"John Acomb, Jr., challenged by defendant for implied bias; not denied; allowed; juror excused."

"Henry F. Benton challenged by defendant for implied bias; allowed; juror excused."

Now, the argument of the Court is that the record does not show the specific ground on which the challenge was made to juror Silas T. Lake, or the section under which it was made, or that any specific ground of challenge was stated as required by the Statute, and that consequently there was no challenge interposed which the Court could do other than disregard, yet, in the other instances above quoted, the record shows no further facts, no better specification of the ground of challenge, no affirmative showing that the Statute requiring specific ground of challenge to be stated was complied with, and still, in two cases the challenge is allowed, and in one not even denied by the prosecution. Does the fact that the Court has disallowed one challenge and allowed another, where the record is the same, raise any presumption that the former did not comply with statutory requirements as to being specific, while the latter did—a presumption that the decision of the Court below is right, whether it allowed a challenge that was no challenge at all, and disallowed another similarly defective.

The next case considered by the Supreme Court of Utah, is that of the challenges to jurors David Archibald and Thomas Sappington:

Transcript, p. 4.

"David Archibald challenged by defendant for both implied and actual bias; both challenges denied by the prosecution and both overruled; exception."

The Court argues from this statement of the minutes that the challenge was not a challenge at all as provided by Statute, but a simple statement of counsel that they did challenge juror "for both implied and actual" in *haec verba*.

Transcript, p. 17.

No one would for a moment contend that if counsel should, in examining a juror, say, "I challenge John Doe for both implied and actual bias," it would be in any sense a challenge. But the fair construction of such an entry is that it is a record showing that such specific statement of a ground of challenge was made as alone would constitute a challenge, or warrant the entry in the minutes "challenged by defendant, etc."

Transcript, p. 4.

"David A. Anderson challenged by defendant for implied bias; overruled; by defendant actual bias; excused by the Court."

"George W. Earl challenged by defendant for implied bias; denied; overruled; exception; challenged by defendant for actual bias; allowed; excused."

Transcript, p. 5.

"Silas Pack challenged by defendant for actual bias, denied by prosecution; allowed by the Court; excused."

"Edward Borcer challenged by defendant for bias; not denied; excused."

The latter entry does not show even that the bias challenged for was implied or actual, and yet it is not even denied by the prosecution and the juror is excused.

Is it not the fair presumption that all the challenges made complied with the Statute in form, and that the clerk made the entry in the minutes believing it to be a sufficient entry to establish as part of the record that the Court overruled a challenge properly stated?

That it is the entry that should have been made is not contended. But it is contended that it is a sufficient showing that a challenge was made in due form, as is shown by the fact that some challenges so recorded were not even denied, others with same entry allowed, while others were disallowed. In that it does not state the challenge as actually made, it does not comply with the Statute, and is error on the face of the record.

If it be true that any of the challenges allowed were really challenges under the Statute, and the record is defective as to them, it will be presumed in like degree defective in its entries of the challenges disallowed.

That the record shows no examination of the challenged jurors on their *voir dire*, and therefore nothing by which the Supreme Court could review the ruling of the lower court on the challenge, it is contended by plaintiff in error is another particular in which the record fails to comply with the mandatory provisions of the Statute. The Statute meant to cover such examination, or at least the particular part thereof on which the challenge was based, under and within the plain meaning of the word "proceedings," above quoted, and intended that the ruling of the Court on the challenge, together with the proceedings on which the challenge was based and disallowed, should go up in the record. The record failing to comply with the Statute in that respect shows error which should reverse the judgment; otherwise, as in this case, the refusal of the Court to settle the bill of exceptions would render of no avail a specific challenge interposed to

a clearly disqualified juror, disallowed by the Court and the ruling excepted to.

THIRD

The Court erred in trying challenges for actual bias instead of appointing triers as provided by law. The Laws of Utah of 1878 provides:

SEC. 247. "If the facts are denied the challenge must be tried as follows:

1. If it be for implied bias by the Court.
2. If it be for actual bias by triers."

SEC. 253. "The triers must thereupon find the challenge either true or not true, and their decision is final. If they find it true the juror must be excluded."

Under the provisions quoted above, the minutes of a challenge for actual bias should certainly show that triers were appointed, if such were the case. The decision of the triers is a verdict, true or not true; the Court simply disallows. The entry would necessarily be different.

This Court will take notice of the practice of the District Court in respect to recording in the minutes the fact that triers were appointed, and their verdict. The absence of anything in the record showing that triers were appointed, and the fact affirmatively appearing from the minutes that the disposition of the challenge is such as could not have been made triers, raises the presumption that snch challenges were tried by the Court. But it expressly appears in two cases that the challenge for actual bias was tried by the Court.

Transcript, p. 4.

"David A. Anderson challenged by defendant for implied bias; overrulled; by defendant for actual bias: excused by the Court."

Transcript, p. 5.

"Silas Pack challenged by defendant for actual bias; denied by prosecution; allowed by the Court; excused."

If the law providing for triers in such challenges was in force at the time of the trial, the record shows error in that the Court, without appointing triers, allowed and disallowed challenges for actual bias.

It is argued that Sections 26, 27 and 28 of an Act of the Legislature of Utah, approved March 13, 1884, and amending the Criminal Practice Act, repealed the law of 1878.

There is no claim that if said act of 1884 was in force there was error in the Court trying such challenges, but the act was not in force at the time of the trial.

The Act of the Utah Legislature of January 19, 1854, Compiled Laws of Utah, Sec. 2, provides:

"That each act and resolution is in force from the date of its publication in any public manner, unless a certain time is specified."

This Court will take judicial notice of the time when the law repealing the law of Utah of 1878 went in to force. The record is necessarily silent as to the facts in the case, nor does the Supreme Court of Utah declare what they found the facts regarding the publication to be.

It is contended by the plaintiff in error that the "publication in any public manner" must be construed to mean that the publication must be made by some public officer, and under authorization of the proper public power, and that no publishing as a matter of private enterprise is the publication required.

Unless this construction be taken, the act is the barest tautology, for publication fully expresses the idea of causing to be widely known.

The elementary rule is invoked that all the words of the law must be given their full and natural effect if possible.

FOURTH.

The Court erred in deciding that the time had

passed for filing the defendant's bill of exceptions. The order of the Court is as follows:

"Friday, May 16th, A. D. 1884. The time allowed by law for filing the bill of exceptions herein having passed, the Court, upon application of defendant's counsel, refuses to further extend the time. Defendant excepts."

Transcript, p. 9.

The judgment of the Court was rendered May 9th, 1884. The Laws of Utah of 1878 provide:

SEC. 310. "A bill containing the exceptions must be settled and signed by the Judge, and filed with the Clerk, within ten days after the trial of the cause, unless further time is granted."

The Law approved March 13, 1884, amends the above as follows:

"When the party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of the bill must be prepared by him and presented, upon notice of at least ten days to the Prosecuting Attorney, to the Judge for settlement, within fifteen days after judgment has been rendered against him."

The record shows that the verdict was filed May 5th.

Transcript p. 8.

If the law of 1878 governed at that time, the Court erred in the exercise of its discretion in making such order. But only six days had passed since the judgment was rendered, and if the Statute of Utah of March 13, 1884, had come into effect, the Court erred in deciding that the time for settling the bill of exceptions had passed.

But we have seen before that if the law of 1878 aforesaid governed, the Court erred in not appointing triers to try challenges for actual bias.

FIFTH.

The Court erred in disallowing defendant's challenges to jurors John Gillespie and Joseph C. Hamilton, for refusing to answer whether they were living in polygamy or not.

The opinion filed by Justice Twiss holds in effect: That the practice of polygamy does not disqualify a juror from sitting on any causes except a trial on an indictment for polygamy.

2. That if it did disqualify from all jury duty, the failure to answer when questioned whether he was living in polygamy, did not furnish ground for sustaining the challenge.

SEC. 8, of the 47th Chapter of the Statute of the United States, approved March 22d, 1882, provides: "That no polygamist, bigamist, or any other person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or eligible for election or appointment to, or be entitled to hold any office or place of public trust, honor or emolument, in, under or for any such Territory or place, or under the United States."

The jurors John Gillespie and Joseph C. Hamilton were each questioned whether they were living in polygamy, each refused to answer and were challenged under said Eighth Section, the challenge was disallowed and defendant excepted.

The Laws of Utah, 1878, Sec. 249, provides: "Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry."

Now, if the above quoted Sec. 8 disqualifies a prac-

ticing polygamist from sitting on a jury, the juror challenged under that section was, by the Statute of Utah aforesaid, bound to answer the question, for in that case it would be wholly partinent.

It is contended by the plaintiff in error that one living in the practice of polygamy is disqualified by Sec. 8 from sitting on any jury.

While the position of juror may lack that element of permanence which is necessary to constitute an office, it is argued with confidence that it is such a position as comes fully within the broader signification of the word "place" of public trust, honor or emolument. It is a place of *trust*, because the vital interests of the community are given to his charge and made subject to his decision; of *public* trust, because it is no selfish or private end that takes him there—no private duty that binds him—he stands in the place of the Commonwealth to judge between the offended law, whose dignity and enforcement rest in his hands, and the offending culprit, whose life is given into his hands, to spare or take under the law as he may think right. He is there not of his own choice but at the will of the Commonwealth, in whose stead he stands, whose law he swears to uphold, and whose power over property and the life and liberty of the citizens is largely given into his hands. He is paid from the public treasury, so that it is a place of public emolument. He is put in that place because he is "a good man and true," the peer of any dweller in the land, so it is a place of public honor. The wording of this section given its natural meaning, would certainly disqualify those coming under it provisions from sitting on a jury.

But it is contended that because the Fifth Section of the same act expressly renders one who "is or has been living in the practice of polygamy, or unlawful cohabitation with more than one woman," incompetent to sit as a juror on the trial of any prosecution for bigamy, etc, it by implications excludes the construction of Sec. 8 contended for by plaintiff in error.

There is no inconsistency or contradiction between the two sections if each be given its full meaning, and the end to which each was directed be considered.

The end sought by the act was the suppression of polygamy, and in aid of that end two kindred but separate methods were evident, requiring different provisions of statute.

1. The first was to facilitate the conviction of those who had been or should be indicted for a violation of the law forbidding polygamy.

2. The prevention of the crime by putting those practicing it under certain disqualifications that would tend to make the practice of the crime disreputable and odious

In carrying out the first method the object sought was to exclude from juries trying polygamy cases all those who might be supposed favorable or lienient towards the crime. All such had been excluded from such juries under the laws of Utah providing for a challenge for actual bias, but that challenge was an issue of fact and could be enforced only by the verdict of triers, who judged as to the state of mind of the juror as a matter of fact, and whose decision was final. Sec 5 of said act made the state of certain jurors minds, when challenged on that ground, a conclusive inference of law, to be drawn by the Court from the existence of certain facts. It disqualifies one "who is or has" been living in the practice of polygamy, who is violating or has violated the law, as well as one who believes in the practice of polygamy, which belief can be held without violating the law.

This was carefully worded to include all who might be supposed to have a too favorable opinion of those accused of violating this law.

Not content with excluding all who now are living in, or believe in the practice of polygamy, it goes to those who have lived in polygamy. Nothing is said of exclud-

ing those who have believed in the practice, for they would not be apt to have any favorable bias toward an offender against the law.

Thus it is seen the whole aim of this section is to free juries trying prosecutions for polygamy from all persons supposed to be favorable toward the crime.

The object of the Eighth Section is wholly different, and it deals with a different class of persons. It imposes no disabilities on those who have in the past been violators of the law against polygamy, none on those who believe in the practice of polygamy, but confines itself strictly to those who are actually violating the laws of the United States.

Now, could a statute be framed which in more concise terms acccomplishes all its ends? Actual polygamists could not, in the Fifth Section, be excluded from sitting on all juries, for that section was devoted to clearing juries trying polygamy cases, and it was wished to exclude those who had been, as well as those who were, living in polygamy.

But the other section supplies a severer remedy to those actually practicing polygamy, and makes them ineligible to any office or place of public trust, honor or emolument, and takes away from them the right to vote.

Surely it is no stretch of construction to hold that Congress meant to deprive them of the right to sit on juries when it is remembered that the vote is taken away from them, and that in most states the qualification of jurors and electors are the same.

Does a man who has been deprived of his vote because he is practicing a felony fill the discription of the juror who is to be "a good man and true," the peer of the citizen who may be on trial for his life, but who is presumed innocent until his guilt is proven?

Aside from the section of the Law of Utah above quoted, the reasonable test to be applied to a juror who is

challenged under this Sec. 8 of the Edmunds Law is to require him to deny that he is living in polygamy, and if he will not do so, exclude him.

Would it be contended that under this section a polygamist trying to vote, who, on being challenged, should refuse to even deny that he was a polygamist, should be allowed to vote unless the challenger straightway proved the charge? Would an elected or appointed officer who, charged with being a polygamist and asked whether he was or not when he sought to qualify, refused to answer or to take the oath that he was not, be allowed to enter upon his office? Certainly the plain and evident proof that the charge was true would be a refusal to deny that it was so.

If that challenge be made to a juror and he deny the charge, still doubtless proof of the fact could be made, but as refusal to answer should be conclusive evidence that the charge was true.

If any other test be taken it would entail that a challenged vote would require a conviction, and in order to show one ineligible to an office he would need to be sentenced to the penitentiary.

The record shows that each juror was sworn on his *voir dire*.

Transcript, pp. 2 and 3.

His refusal to answer a question which he was bound both by statute and his oath to answer should settle the matter without any evidence. There is no issue joined, no need of proof. The charge stands tacitly admitted.

In the cause at bar, John Gillespie, the juror challenged under said Sec. 8, and the challenge was overruled, remained on the jury after defendant's peremptory challenges were exhausted, and was made foreman of the jury.

Transcript, p. 7.

To what other public place, not an office, could a citizen be elected by his fellow citizens, and elected for the performance of a public duty as distinguished from the duties of other jurymen?

The Act of Congress approved June 23, 1874, commonly called the Poland Bill, in Sec. 4, gives each side fifteen challenges in capital cases.

The record shows that the following jurors were challenged peremptorily by defendant:

1, Orrin S. Lee; 2, Ephraim Hatch; 3, William Gedges; 4, George Pack; 5, George M. Turpin; 6, D. C. Booth.

Transcript, p. 3.

7, Paul A. Elkin; 8, Joseph C. Hamilton; 9, Byron Roberts.

Transcript, p. 4.

10, Joseph A. Wagstaff; 11, James Barton; 12, Ormus E. Bates; 13, Wm. C. Winder; 14, Silas T. Lake; 15, Alexander Pringle—15.

Transcript, p. 5.

Which being the full number allowed by law, the record shows affirmatively that defendant exhausted his peremptory challenges.

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114-488

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

FREDERICK HOPT, PLAINTIFF in error, *vs.* THE PEOPLE OF THE TERRITORY of Utah.	No. 1141.

BRIEF FOR THE DEFENDANTS IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

FREDERICK HOPT, PLAINTIFF in error, *vs.* THE PEOPLE OF THE TERRITORY of Utah.	No. 1141.

BRIEF FOR THE DEFENDANTS IN ERROR.

The case is an indictment for murder.

The plaintiff in error has been three times capitally convicted, and as many times sentenced to death.

Two of the judgments have been reversed by this court (*vide* 104 U. S., 631, 110 U. S., p. 574), and this writ of error is brought to reverse the third.

There are five assignments of error, which we will consider in their order.

FIRST.

This assignment is, that "the record showed error in that it did not comply with the statute of Utah, requiring that the *written charges of the court should form part of the record of the action.*"

The answer to this point is that the plaintiff in error having failed to move the supreme court of the Territory for a *certiorari* upon a suggestion of diminution, and allowed the cause to be determined on the record as now presented, this court must necessarily review the judgment of the supreme court of the Territory upon the same record, upon the principle *de non apparentibus et de non existentibus eadem est ratio.*

It is said that there was no time to apply for a *certiorari*, owing to the refusal of the Territorial courts to grant a stay of execution, and reference is made to the unsuccessful efforts made in that behalf shown by the record.

It appears by the judgment of the supreme court (p. 11), but not otherwise, that the plaintiff in error applied to the court of first instance for a stay of execution, that the application was denied, and that the supreme court affirmed the judgment of refusal.

It so fared with the application necessarily, because it was made in total disregard of section 366 of the Territorial Code of Criminal Procedure, which provides that—

> An appeal to the supreme court from a judgment of conviction stays the execution of the judgment upon filing with the clerk of the court in which the conviction was had a certificate of the judge of such court or of a justice of the supreme court that, in his opinion, there is probably [*sic*] cause for the appeal, *but not otherwise.* (LL. of Utah, 1878, p. 138; *Vide etiam*, §§ 367–'68–'69.)

It was not by an order of any court that an "appeal" could be made suspensive, for the law provides that the *only way* in which proceedings under a judgment of con-

viction can be superseded is by lodging with the clerk of the court in which the conviction took place a certificate of probable cause granted by the judge of that court or a justice of the supreme court, *and that execution shall not be suspended otherwise.*

As it cannot be presumed that the prisoner's counsel were ignorant of this provision of law, we must conclude that their application was not made in conformity to law because they apprehended a refusal of the certificate of probable cause.

That no injustice may be done the prisoner, we call the attention of the court to the statement made in an affidavit of one of his counsel (R., p. 14), "that courts and justices of supreme court in Utah had refused stay *or certificate of probable cause.*"

If, however, the certificate of probable cause had been refused, such action is not reviewable here, nor was it reviewable by the Territorial supreme court, but is absolutely conclusive.

Again, it does not appear that the instructions given were written. They might have been oral, by consent of parties, in which case the record would show nothing touching them unless they had been made the subject of a bill of exceptions. We submit that this is the proper reading of the 7th article of section 257 (LL. Utah, 1878), which provides:

> 7. The judge must then charge the jury, if requested by either party; he may state the testimony and declare the law, but must not charge the jury in respect to matters of fact; and in each case he shall inform the jury that they are the sole judges of the

> credibility of the witnesses, of the weight of the evidence, and of the facts; such charge must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally.

It is said furthermore, on this head, that a motion to amend the record was made in the trial court and denied, and that this action was affirmed by the supreme court. But it is not said that the motion in question was to incorporate the written charges of the court; we are left, however, to *infer* that, while the record is *wholly silent.*

We take leave to append to this brief an affidavit, marked B, of the deputy clerk of the trial court, showing on what grounds that motion was made, and that those grounds had no reference to the instructions of the court.

We also append an affidavit, marked A, of this deputy clerk to the effect that the written charges, whose omission is urged as a ground for reversing the judgment, were left out of the transcript *at the request of one of the prisoner's counsel, he saying that he did not intend to make a point on the instructions.*

It is to be regretted that these affidavits are *ex parte*, but it is submitted that the one relating to the omission of the instructions from the transcript may well warrant inquiry upon evidence *aliunde* the record whether the circumstances in which the instructions were omitted are not such as to estop the accused from making a question upon that omission on this writ of error, or at any rate, whether this court will not refuse to exercise jurisdiction where the error complained of is the direct result of the accused's own act.

It is not to be lost sight of that this assignment of error was not made in the supreme court of the Territory, as must be inferred from the omission of that court to notice it.

SECOND.

This assignment proceeds on the ground that the record shows a failure to comply with article 3 of section 339 (LL. Utah, 1878) which provides that "a copy of the minutes of a challenge interposed to the panel of a trial jury or to an individual juror, and the proceedings and decisions thereon," shall be inserted in the record.

It is contended that under this provision the minutes of the clerk must show under what section the challenge was made, the specific ground on which it was based, and the answers given by the juror, which were relied on to sustain the challenge.

The absence of specification in the record on these heads renders it impossible for a court of error to determine whether the rulings of the trial court touching the various challenges were valid or not.

It would seem not to be the intention of the statute that the minutes of the clerk should be more full in this particular than they are in this record. If the accused desires to have a question arising upon a challenge reviewed by a court of error he should raise it in the accustomed way, by a bill of exceptions.

But supposing it to be the true view of the law that the minutes of the clerk should be as specific as contended, does it appear that the minutes in this case are less certain than the proceedings on which they are founded?

If the record contains any such evidence we have not been able to discover it. This court cannot supply the want of a bill of exceptions by arbitrary assumption.

THIRD.

This assignment proceeds on the ground that the trial court erred in trying the challengee for actual bias, instead of appointing triers, as provided by sections 246, 247, and 253 of the criminal procedure act of 1878.

The act of March 13, 1884, amended section 246 by enacting that that section should read as follows: "Sec. 246. If the facts are denied the challenge must be tried *by the court*."

As the trial of the accused did not begin until the 28th of April, 1884, the repealing act was then in force.

It is contended, however, that the repealing act was not in force because not published in accordance with the act of 19th January, 1854, which provides "that each act and resolution is in force from the date of its publication in any public manner, unless a certain time is specified."

But in no way does it appear what was wanting to give the repealing act force and effect.

I beg to incorporate in this brief an extract on this point from the brief furnished me by the learned district attorney of Utah:

> The third assignment of error is, that the court erred in trying challenges for actual bias, instead of appointing triers, as provided in subdivision 2, of section 246, of criminal practice act of 1878. There are several answers to this assignment: First, conceding that the law of 1878 requiring triers had not been

repealed by the law of 1884, yet there was no error in the failure of the court to appoint triers, because the challenges as made might properly be disregarded by the court. The form of the challenge in each case, as the record shows, and as the fact is, was as follows: "Challenge for actual bias," or "challenge for bias." (See transcript, pp. 2 to 5.)

The statute, whether the act of 1878 or 1884 is to be taken as in force at the time of the trial, required the party challenging for implied bias, to state one or more of the causes stated in section 242 of the act of 1878, and in challenging for actual bias, to state the cause stated in the second subdivision of section 241, of the act of 1878, as the ground thereof. See sec. 244 of the Crim. Pr. act of 1878 and the amendment thereto in 1884, laws of 1884, p. 124, sec. 26. (It will be observed that in the original section, 244, treating of challenge for actual bias, there is an error in referring to section 241; the reference should be to the second subdivision of 241, and such evidently was the intention of the legislature, and it was so amended in the laws of 1884, p. 124, sec. 126.) The requirement of the statute, that the cause shall be so stated in the challenge is mandatory, and cannot be disregarded. (People *vs.* Reynolds, 16 Cal., 129; Freeman *vs.* People, 4th Denio., 31; Mann *vs.* Glover, 2d Green, 195; People *vs.* Cotta, 49 Cal., 166; People *vs.* Buckley,, 49 Cal., 241; People *vs.* Gungill, 41 Cal., 429.)

2d. The plaintiff in error, by failing to request the court to appoint triers, and by failing to except to the action of the court in trying challenges for actual bias, waived the error, if it was error. (3 Wharton Crim. Law, 7th ed., sec. 3174; People *vs.* Doe, 1 Mann, Mich., 451; People *vs.* Rathbun, 21 Wend., 509.)

The course pursued by counsel for defendant below, in this respect, was as follows: They would interpose a challenge in the following form: "Challenge the juror for actual bias," and straightway they would proceed to examine the juror on the challenge before the court, evidently taking it for granted at the time that the law of 1884, a copy of which they had before them, and which abolished triers, was in force. Thirdly, *it does not affirmatively appear in the record in the case that challenges for actual bias were, in fact, tried by the court.* Before plaintiff can claim error he must make it plainly apparent that the error was committed; finally, the law requiring triers to be appointed was repealed by the legislature in 1884 (see laws of 1884, p. 124, secs. 27, 28, and 29). This was the statute in force at the time the case was tried. It was approved, as it shows upon its face, March 13, 1884, while the record shows that the trial did not commence until the 28th day of April, 1884, more than a month after the passage of the act. It is true that the statute of Utah, 1854, compiled laws, section 2 provides, "That each act and resolution is in force from the date of its publication in any public manner, unless a certain time is specified."

If the statute in question had not, in fact, been so published, and was not therefore in force at the time of the trial, it was the duty of appellant to have made the record show that fact. It will not be presumed in the absence of any showing whether there has been such publication or not, that the court below erred in holding that the act of 1884 had been published as contemplated, and was in force at the time of the trial. In the absence of such showing, how can this court reach the conclusion that the law had been so published, and was not therefore in force?

FOURTH.

This ground of error is that "the court erred in deciding that the time had passed for filing the bill of exceptions in said cause" (R., p. 9).

If the time for filing the bill had not passed, why then did not the counsel for the accused tender a bill to the court?

If, on the other hand, the time had passed, the record should show the ground on which the application for an extension of time was based, supposing that the ruling of the court in that behalf was reviewable on writ of error.

FIFTH.

This ground of error is that "the court erred in disallowing defendant's challenges to jurors John Gillespie and Joseph C. Hamilton for refusing to answer whether they were living in polygamy or not."

On this point we refer to the opinion of the court, and avail ourselves of the following discussion of the subject by the district attorney.

> The fifth and last assignment is, that the court erred in not allowing defendant's challenge to jurors John Gillespie and Joseph C. Hamilton, because of their refusal to answer whether they were polygamists or not, it being claimed by appellant that the act of Congress of March 22, 1882, commonly known as the "Edmunds' bill," does, by the eighth section thereof, disqualify a polygamist as a juror in all cases. This we dispute. The eighth section alone, we say, would not have this effect. A juror is not embraced within the provisions of that section. That it was not the intention of Congress is clearly apparent from

the provisions of section 5 of the same act, wherein it is provided that in any prosecution for *bigamy*, *polygamy*, or unlawful cohabitation, it shall be sufficient cause of challenge to any person drawn as a juror, &c., that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman. This provision of section 5 serves no purpose and is utterly useless if section 8 absolutely disqualified all such persons as jurors in all cases.

Again, section 5 provides that if a polygamist, &c., drawn as a juror in any prosecution for polygamy, &c., shall answer that he is a polygamist, or bigamist, &c., his answer shall not be given in evidence against him, in any prosecution against him for such offense, thereby protecting the rights of the jurors so interrogated. But, if the claim of appellant be true that a polygamist is disqualified as a juror in all cases, and he be asked the question in any prosecution, other than for polygamy, &c., whether he be a polygamist, &c., and he should answer "Yes," his answer might be given in evidence against himself if he should be thereafter indicted and prosecuted for polygamy or unlawful cohabitation. Congress never could have intended such an injustice as this would be. [Such legislation would seem to violate the spirit, if not the intent, of Amendment V of the Constitution.] Again, in prosecutions for polygamy, &c., the refusal of the juror to answer whether he is a polygamist is made sufficient ground for challenge by section 5 of said act. There is no such provision in the act with reference to the competency of such juror in any other class of prosecutions. How, then, if it be true that a polygamist is disqualified by section 8 of the act from serving as a juror in any case, is the fact of such disqualification to be established? Surely something more would be required to establish it than the

simple declination of the juror to answer the question. The method of establishing the sufficiency of the challenge in prosecutions for polygamy, and the means of protecting the juror who, in such cases, answers that he is a polygamist, are so carefully provided for in section 5, where the intention of Congress was to exclude him from the jury, that it is evident that it was not the intention to exclude him in any other class of cases.

It is respectfully submitted that the judgment should be affirmed.

WM. A. MAURY,
Assistant Attorney-General.

APPENDIX.

A.

In the Supreme Court of the United States.

FREDERICK HOPT, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF Utah, defendant in error.

TERRITORY OF UTAH,
County of Salt Lake, ss.:

H. G. McMillan, being first duly sworn, deposes and says: I am, and for more than five years last past, continuously have been, deputy clerk of the district court of the third judicial district of the Territory of Utah, in which the above-entitled action was tried. That the counsel for the said Frederick Hopt, in the above-entitled case, at the last trial thereof, and who took the appeal in said case from the judgment and sentence made therein by the said district court on the 9th day of May, 1884, requested me, as such deputy clerk, to prepare a transcript on appeal in said case, and to certify the same to the supreme court of Utah Territory.

That the time within which said counsel requested said transcript to be so prepared being limited, one of said counsel, viz, W. G. Van Horne, esq., or S. H. Snyder, esq., I cannot positively aver which of the two, requested me, as such deputy clerk, to prepare such transcript with all possible dispatch, and to omit therefrom the written charge given by the court to the jury at said trial, stating to me at the time that no point was to be made by defendant upon the instructions given by the court to the jury, and

that it would be useless to delay the transcript on account of said instructions. That as soon as I had prepared said transcript, in accordance with the request and direction of defendant Hopt's said counsel, I delivered the same to said counsel, and the same was received by them, and by them filed with the clerk of the supreme court of the Territory. That it was by reason alone of said request of said counsel that said written charge was omitted from the record.

That Exhibit A [B] hereto annexed is a true and correct copy of the motion made by counsel for said Hopt to amend the record in said case in said district court, and said motion was the only motion ever made in said court to amend said record. That no bill of exceptions in said case was ever filed, or offered to be filed, or presented to said district court or the judge thereof for settlement.

H. G. McMILLAN.

Subscribed and sworn to before me this 7th day of January, 1885.

J. M. ZANE,
Clerk Third District Court, Utah Territory.

B.

In the district court in and for the third judicial district of Utah Territory, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF Utah *vs.* FREDERICK HOPT, INDICTED UNDER the name of Fred Welcome, and impleaded with another.	Indictment for murder in the first degree; motion to amend record.

Now comes the defendant, Frederick Hopt, by his counsel, and respectfully moves said court to amend the

record in the above-entitled case by inserting therein the proceedings on the challenges to Jurors A. J. Pendleton, John Willoughby, and John Gillespie, including so much of the examination of said jurors on their voir dire as may be necessary to show the grounds of each of said challenges, and the decisions thereon, so that said record may conform to the provisions of subdivision 3 of section 339 of the criminal procedure act of said Territory.

The following amendments of said record are asked for, to wit:

In the examination of said juror, A. J. Pendleton, the following answers to questions put by counsel for defendant as follows:

Question. Have you formed or expressed an opinion as to the guilt or innocence of defendant?

Answer. Yes, sir; I have formed an opinion from what I have read.

Question. Is it such an opinion as it would require sworn evidence to remove?

Answer. Yes, sir; it would require evidence to remove it.

In the examination of said juror, John Willoughby, the following answers to questions put by the counsel for the defendant, to wit:

Question. Do you know anything about this case?

Answer. Only what I have read about it in the papers.

Question. Have you talked with any one who purported to know the facts of the case of their own knowledge?

Answer. No, sir; only with persons who had read of it.

Question. Have you ever formed or expressed an unqualified opinion as to the guilt or innocence of defendant?

Answer. I have never expressed an opinion that I know of.

Question. Have you formed an opinion?

Answer. Yes, sir.

Question. Was it such an opinion as it would require sworn evidence to remove?

Answer. Yes, sir; strong evidence.

In answer to questions put by the United States district attorney for the Territory of Utah, the following answers in substance:

Question. Mr. Willoughby, you say you have no knowledge of the case except what you have learned from reading the newspaper accounts?

Answer. No, sir; none whatever.

Question. From what you have read, do you say you have formed an opinion as to the guilt or innocence of the defendant?

Answer. Well, sir, I had an idea about it.

Question. Was your idea a fixed, settled opinion, or was it a conditional, hypothetical one, based on the truth or falsity of what you had read?

Answer. It was based upon the truth or falsity of what I had read.

Question. In trying this case would you allow any opinion you may have formed to influence you, or would you be governed wholly by the evidence?

Answer. I would try to be governed by the evidence.

Question. But would you?

Answer. Yes, sir; I think I would.

Question. Mr. Willoughby, you will be sworn to try this cause according to the evidence; now, would you allow yourself to be influenced by your opinion in this trial?

Answer. No, sir; I would not.

Question. Would you try the case fairly and impartially?

Answer. Yes, sir.

In answer to redirect examination by counsel for defendant, on challenge for actual bias, the following answers:

Question. Mr. Willoughby, you say you have formed an opinion as to the guilt or innocence of the defendant?

Answer. Yes, sir; I have.

Question. Is it such an opinion that it would require sworn evidence to remove it?

Answer. Yes, sir; pretty strong evidence.

Question. Have you that opinion still?

Answer. Yes, sir.

Question. Have you any actual prejudice against the defendant?

Answer. No, sir.

On the examination of Juror John Gillespie, the following proceedings:

Question by for COUNSEL defendant:

Question. Mr. Gillespie, are you a bigamist or polygamist?

(By juror to court.) Am I bound to answer that question.

Instruction from the court that he was bound to answer no question which if answered would tend to criminate himself.

Question. Mr. Gillespie, are you a bigamist or polygamist?

Juror refused to answer, and was challenged for lack of general qualification; challenge disallowed and exception taken.

Also that the record shows that challenges for actual bias were decided by the court, and that such other or further amendments be made in the record on the points above referred to as may be consistent with the truth and necessary to conform the said record to the statute above referred to.

S. H. SNIDER, AND
W. G. VAN HORNE,
Attorneys for Defendant.

Filed May 20, 1874.

O. J. ANWELL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

Without waiving any objection to the right of defendant to make said motion, service of copy accepted this 20th day of May, 1884, is admitted.

W. H. DICKSON,
United States Attorney.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, John M. Zane, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original motion to amend record filed May 20, 1884, in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 5th day of January, A. D. 1885.

[SEAL.] J. M. ZANE, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

Extracts from the laws of Utah.

(LAWS OF 1878.)

SEC. 230. If the sufficiency of the facts alleged as ground of the challenge is denied, the adverse party may except [to] the challenge. The exception need not be in writing, but must be entered on the minutes of the court, and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

SEC. 245. The adverse party may except to the challenge in the same manner as to a challenge to the panel, and the same proceedings must be had thereon as are prescibed in section 230, except that if the exception be allowed the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

SEC. 246. If the facts are denied, the challenge must be tried as follows:

1. If it be for implied bias, by the court.

2. If it be for actual bias, by triers.

SEC. 247. The triers are three impartial persons, not on the jury panel, appointed by the court. All challenges for actual bias must be tried by three triers thus appointed, a majority of whom may decide.

SEC. 310. A bill containing the exceptions must be settled and signed by the judge, and filed with the clerk within ten days after the trial of the cause, unless further time is granted.

SEC. 339. When judgment upon conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction (if one), and must, within five days, annex together and file the following papers, which constitute a record of action:

1. A copy of the minutes of a challenge interposed by the defendant to the panel of the grand jury, or to an individual grand juror, and the proceedings and decisions thereon;

(LAWS OF 1884.)

SEC. 33. That section 310 of said act be amended so as to read as follows: Sec. 310. When the party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of the bill must be prepared by him and presented, upon notice of at least ten days to the prosecuting attorney, to the judge for settlement, within fifteen days after judgment has been rendered against him, unless further time is granted by the judge, or by a justice of the Supreme Court, or within that period the draft must be delivered to the clerk of the court for the judge. When received by the clerk he must deliver it to the judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the judge, and filed with the clerk of the court.

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